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Supreme Court, U.S.
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No. 07-842

IN THE

Supreme Court of the United States

ABN AMRO VERZEKERINGEN BV,

Plaintiff-Appellant,

- against -

GEOLOGISTICS AMERICAS, INC. and
ALFRED JAMES doing business as
ART MESSENGER AND DELIVERY SERVICE,

Defendants-Appellees,

DHL AIRWAYS, INC.,

Third-Party Defendant,

HARTFORD FIRE INSURANCE COMPANY,

Consolidated Plaintiff.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was it proper and appropriate for The United States Court of Appeals for the Second Circuit to affirm a judgment of the District Court which awarded $50 limitations of liability to (1) an illegal, unlicensed common carrier which had failed to issue a bill of lading, have a tariff, or even freight rates and (2) the freight forwarder which, outside the scope of its authority, had hired the illegal carrier and had never even disclosed to the shipper the name of the trucker thereby depriving it of a "fair opportunity" to declare a value for carriage?

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PETITION FOR A WRIT OF CERTIORARI

ABN AMRO VERZEKERINGEN BV ("ABN AMRO") respectfully petitions for a Writ of Certiorari to review the opinion and judgment of The United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Second Circuit dated April 23, 2007, is officially reported at 485 F. 3d 85 and is reproduced herein at Appendix A.

The Memorandum Decision and Order of The United States District Court for the Southern District of New York dated April 1, 2005 wherein the Court granted Defendants' Motion to dismiss the Complaint and ordered that Judgment be entered in favor of Plaintiff for $50 against each Defendant is unofficially reported at 2005 U.S. Dist. LEXIS 5723 and is reproduced herein at Appendix B.

Preceding the above Decision and Judgment, the District Court had denied Plaintiff's Motion for Summary Judgment, but had granted Defendants' Cross-Motion for Summary Judgment limited their liability to $ 50. That Decision is reported at 273 F. Supp. 2d 757, 2003 U.S. Dist. LEXIS 5007 (2003) and is reproduced herein at Appendix C.

JURISDICTION

The Judgment of The United States Court of Appeals for the Second Circuit that is sought to be reviewed, was entered on April 23, 2007. Plaintiff-Appellant timely filed a Petition for a Rehearing *En Banc* which was denied on July 30, 2007. This Petition was timely under 28 U. S.C. § 2101 (c) and Supreme Court Rule 13 because it was filed within 90 days of the denial of Rehearing. Regrettably, the printing font used in the Petition was incorrect and the papers were returned to Petitioner on October 29, 2007 with instructions to re-file, using the correct font, within 60 days. Therefore, this re-filing is timely and this Court has jurisdiction to review the Judgment of The United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are in the New York State Transportation Law §§ 95, 98, 103 and 111. These provisions are reproduced at Appendix D.

STATEMENT OF THE CASE

In June, 2000 ABN AMRO'S subrogor, Halm Industries Inc., ("Halm") shipped a multiple ton and valuable printing machine from Germany to Huntington Station, New York. Halm entered into an arrangement with Defendant-Appellee, Geologistics Americas, Inc. ("Geologistics") to arrange for the pick up of the machinery at JFK Airport in Queens, New York on June 20, 2000 from DHL Airways, Inc. Geologistics retained Defendant-Appellee, Alfred James d/b/a Art Messenger and Delivery Service ("Art Messenger"), an unlicensed household effects mover, to transport the machinery to Huntington Station, New York. At the time it picked up the machinery, Art Messenger issued a clean receipt to DHL Airways. Neither Geologistics nor Art Messenger issued any bill of lading, contract of carriage or other document for the shipment. Nor did Art Messenger have any tariffs or rate schedule. On June 21, 2000 Art Messenger delivered the machine in question to its destination in Huntington Station, New York at which time it was discovered that the largest crate containing the body of the machine was severely damaged. Six days *after* the damage to the machine in question, Geologistics issued its only document to Halm, to-wit a sales invoice. That document provided *inter alia* that Geologistics assumed no liability as a carrier and that it was authorized to select a trucker which was to be considered as the "Agent" of Halm and that the goods may be "entrusted to such carrier subject to all conditions as to limitation of liability for loss or damage appearing in bills of lading, receipts or tariffs issued by such carrier." At no time did Geologistics advise Halm as to the name of the carrier

(Art Messenger) it had retained and since Art Messenger issued no bill of lading, receipt or tariffs, there was no possibility for Halm to declare a value on the machine it was shipping.

Plaintiff-Appellant, ABN AMRO, as subrogee of Halm, commenced this action against Geologistics and Art Messenger on June 21, 2001 seeking damages of $478,341,000. In 2003 the District Court denied Plaintiff's Motion for Summary Judgment, but granted Defendants' Cross-Motion for Summary Judgment limiting their liability to $50. A copy of that opinion is annexed hereto at Appendix C. It was reported at 273 F. Supp. 2d 757, 2003 U.S. Dist. LEXIS 5007. On April 6, 2005 The United States District Court for the Southern District of New York (Chin, J.) entered Judgment, without any finding of liability on the part of Defendants, that Plaintiff's claims for damages in excess of $50 be dismissed. (See Appendix B herein). An appeal to the Second Circuit ensued. On April 23, 2007 the Court of Appeals affirmed the Judgment of the Court below at 485 F. 3d 85. (See Appendix A herein.)

Point I

The Court Of Appeals In Affirming The Grant Of A Limitation Of Liability To Art Messenger Acted Completely Contrary To The Applicable Statutory And Case Law In All Circuits, States And In The United States Supreme Court.

The Record in this case is clear that Art Messenger, an illegal, unlicensed trucker, never issued a bill of lading, filed a tariff nor obtained a statutorily required license from the State of New York to operate as an *intrastate* carrier. Under the law, therefore, it was not entitled to a limitation of liability.

New York, New Haven & Hartford RR Co. v. Nothnagle 346 U.S. 128, 135; 97 L.Ed. 1500; 73 S.Ct. 986 (1953)

Mechanical Technology Inc. v. Ryder Truck Lines 776 F. 2d 1085 (2d Cir. 1985)

The failure of a common carrier to issue a bill of lading that notifies the shipper of a limitation of liability and to provide an opportunity to declare a higher value, must result in there being no limitation of liability.

Missouri, Kansas & Texas Ry. v. Harriman 227 U.S. 657, 671; 33 S.Ct. 397; 57 L.Ed. 690 (1913)

Union Pacific RR. Co. v. Burke 255 U.S. 317; 41 S. Ct. 283; 65 L.Ed. 656 (1921)

Caten V. Salt City Movers & Storage Co. 114 F. 2d 428 (2d Cir., 1945)

The Merauke 31 F. 2d 974 (2d Cir., 1929)

Given the fact that Art Messenger never issued a bill of lading, it is clear from the foregoing cases that Art Messenger was not entitled to limit its liability. Moreover, in order for a carrier to avail itself of a limitation of liability to an agreed valuation, a choice of rates must be given in an agreed tariff. *Without such a choice, there can be no such limitation.*

Boston & Maine RR Co. v. Hooker 225 U.S. 97; 34 S.Ct. 526; 61 L.Ed. 868 (1914)

N.Y. Central & Hudson River RR Co. v. Beaham 242 U. S. 148; 37 S. Ct. 43; 61 L.Ed. 210 (1916)

Galveston etc. Ry. Co. v. Woodbury 254 U.S. 357; 41 S. Ct. 114; 65 L. Ed. 301 (1920)

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Point II

The Court Of Appeals Erroneously And Wrongfully Refused To Consider § 111 Of The New York Transportation Law Which Imposes Full Liability For Damages Upon An Illegal And Unlicensed Carrier.

At the oral argument of the Appeal herein before The Court of Appeals, Defendants-Respondents claimed that ABN AMRO had never raised the claim previously that § 111 of the New York Transportation Law imposed full liability upon an illegal, unlicensed carrier such as Art Messenger. That Statute provides in part as follows:

> "In case a common carrier shall do, cause to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by law or by order of the Commissioner, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom....."

That § 111 was applicable herein to Art Messenger is eminently clear by virtue of § 103 of the New York Transportation Law which provides in part that no common carrier subject to its provisions shall engage or participate in the transportation of passengers or property, between points within the State, until its schedule of rates, fares and charges shall have been filed and published in accordance with the provisions

of this chapter. Given the fact that Art Messenger was unlicensed to carry goods intrastate in New York at the relevant times herein and failed to file any schedule of rates or tariffs herein, it is clear that §111 of the Transportation Law imposed full liability upon Art Messenger.

At the oral argument of this case in The Court of Appeals, it was pointed out to the Panel that Counsel for ABN AMRO had furnished the District Court below with a complete briefing of applicable New York Statutory Law, *§ 111, and with copies of all relevant New York Statutes, including § 111*, imposing full liability upon Art Messenger. We were requested by the Court to furnish it with proof thereof. The following business day all of the relevant proof was delivered to the Second Circuit. However, in its decision herein affirming the District Court's imposition of a $ 50 limitation of liability, the Court commented that it would not consider § 111 of the Transportation Law because Appellant had raised it for the *first* time in its Reply Brief in the Appeal herein; something that was completely belied by the Record. Further, the Briefs provided to the District Court were at all times on file.

Since it is clear that the New York Transportation Law Imposes full liability upon Art Messenger, the Court of Appeals herein has completely usurped the statutory law of the State of New York and has imposed its own flawed analysis instead. The result opens the Pandora's Box of Court sanctioned illegality.

Point III

The Panel Below Also Disregarded Relevant Precedents In Upholding The Right Of Geologistics To Limit Its Liability.

In this case, Geologistics issued an *ex post facto* Invoice to Halm after the machine in question had been damaged. Said Invoice contained a requirement that in order for Halm to avoid a limitation of liability being imposed upon it, the "Customer" [Halm] had to declare a value *directly* with the carrier. The Sales Invoice was quite clear in this respect. A declaration by Halm was *impossible,* because, as the Record shows, the "Customer" [Halm] was never told the name of the carrier; was never issued any bill of lading; and never provided with any Receipt. *In addition, and in clear violation of New York Law, Art Messenger had no tariff or approved freight from which a declared value might have been selected.* In fact, New York Statutory Law, as briefed in both the District Court and The Court of Appeals, made such illegal, unlicensed trucking criminal. Despite the fact that Geologistics' Sales Invoice clearly stated that any declared value with Geologistics would only increase Geologistics' liability, and not that of "entrusted truckman", Art Messenger's identity was never disclosed to Halm by Geologistics. Thus, there was no opportunity, let alone, "fair opportunity" provided, to declare a value for carriage. In the absence of such a "fair opportunity", as we argued in the District Court and in The Court of Appeals, there could not be any effective limitation of liability.

Sampo Japan Ins. Co. v. Union Pac. RR Co.
456 F. 3d 54, 58 (2d Cir., 2006)

General Electric Co. v. M/V Nedlloyd 817 F. 2d 1022, 1028 (2d Cir., 1987)

New York, New Haven & Hartford RR Co. v Nothnagle 346 U.S. 128; 97 L.Ed. 1500; 73 S.Ct. 986 (1953)

Komatsu Ltd. v. States Steamship Co.
674 F. 2d 806 (9th Cir., 1982)

It is submitted that the misrepresentations made by Geologistics to Halm, and the fact that Geologistics clearly acted outside the scope of its authority, concerning "entrusting" the shipment to a truckman subject to that truckman's bill of lading, receipt or tariff and the fact that the truckman was unlicensed and penally illegal, voids any limitation of liability upon it. In essence, there was absolutely no consideration provided by Geologistics in illegally entrusting, without authorization, the shipment to Art Messenger, an unlicensed household effects mover that was manifestly incapable of transporting heavy machinery. As Art Messenger's President freely admitted at his deposition, Geologistics had previously used Art Messenger on numerous, prior occasions to engage in similar, unlawful New York intrastate transportation.

See:

Alleghany Corp. v. James Foundation of N.Y., Inc.
214 F. 2d 446 (2d Cir., 1954)

Victoria Sales Corp. v. Emery Air Freight, Inc.
917 F. 2d 705 (2d Cire., 1990)

Under all the circumstances, it is clear that Geologistics should not have been permitted to limit its liability, given its actions in hiring an illegal, unlicensed trucker with no bill of lading, tariff or freight rates.

CONCLUSION

CONSIDERING THE FACT THAT THIS IS THE FIRST CASE IN THE HISTORY OF THE UNITED STATES WHEREIN AN ILLEGAL, UNLICENSED TRUCKER HAS BEEN PERMITTED TO LIMIT ITS LIABILITY, THIS COURT SHOULD GRANT *CERTIORARI*, REVERSE THE LOWER COURT JUDGMENT AND SEND THE CASE BACK TO THE DISTRICT COURT FOR A TRIAL ON DAMAGES. IF THIS CASE IS ALLOWED TO STAND, AND ILLEGALITY COUNTENANCED, IT WILL AFFECT MANY FUTURE ACTIONS ADVERSELY.

Respectfully Submitted,

Cone & Kilbourn

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APPENDIX

05-1917-cv
ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005 (Argued: January 27, 2006 Decided: April 23, 2007) Docket No. 05-1917-cv

ABN AMRO VERZEKERINGEN BV,

Plaintiff-Appellant,

-v.-

GEOLOGISTICS AMERICAS, INC. and ALFRED JAMES doing business as ART MESSENGER AND DELIVERY SERVICE,

Defendant-Appellees,

DHL AIRWAYS INC.,

Third-Party-Defendant,

HARTFORD FIRE INSURANCE COMPANY,

Consolidated-Plaintiff.

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Before: LEVAL and SOTOMAYOR, *Circuit Judges*, and KRAVITZ*, *District Judge*.

Plaintiff ABN Amro Verzekeringen BV appeals from a judgment in its favor entered by the United States District Court for the Southern District of New York

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* The Honorable Mark R. Kravitz, United States District Judge for the District of Connecticut, sitting by designation.

(Chin, *J.*) for $50 each against defendants Geologistics Americas, Inc. and Alfred James d/b/a Art Messenger and Delivery Service. On defendants' motions for summary judgment, the district court ruled that plaintiff could recover no more than $50 from each defendant. Without conceding liability, the defendants then each tendered $50, and the court entered judgments in plaintiff's favor, and against each defendant in that amount.

Affirmed.

John E. Cone, Jr., Cone & Kilbourn, Mount Kisco, New York (Joseph A. Kilbourn, Of Counsel, on the brief), *for Plaintiff-Appellant ABN Amro Verzekeringen BV.*

Andrew R. Spector, Hyman, Kaplan, Ganguzza, Spector & Mars, P.A., Miami, Florida; Nicholas E. Pantelopoulos, Kaplan, von Ohlen & Massamillo, LLC, New York, New York, *for Defendant-Appellee Geologistics Americas, Inc.*

John J. Sullivan, Hill Rivkins & Hayden LLP, New York, New York (Laura R. Landau and Kipp C. Leland, on the brief), *for Defendant-Appellee Alfred James d/b/a Art Messenger and Delivery Service.*

LEVAL, *Circuit Judge*:

In this appeal we consider whether in an action for money damages the court may, over plaintiff's objection, enter final judgment in the plaintiff's favor for all the money that plaintiff may lawfully recover, when the defendants, without conceding liability, tender that amount. Plaintiff ABN Amro Verzekeringen BV ("ABN") brought suit in the United

States District Court for the Southern District of New York (Chin, *J.*) alleging damage to cargo being shipped from Europe to the United States. The court found as a matter of law that the liability of defendants Geologistics Americas, Inc. ("Geologistics") and Alfred James d/b/a Art Messenger and Delivery Service ("Art Messenger") was limited by contract to $50 each. When the defendants tendered $50 without conceding liability, the court entered judgment in ABN's favor in that amount. Plaintiff appeals.

Plaintiff ABN is the insurer, assignee, and subrogee of the shipper Halm International Co., Inc. ("Halm"), which suffered a loss of approximately $500,000 as the result of damage to a printing press, which was being transported from Europe to the United States. ABN indemnified Halm for its damages, and then brought this suit against the freight forwarder (Geologistics) and the carrier (Art Messenger).[1] The suit alleged breach of contract, breach of bailment obligations, and negligence. The contracts governing the defendants' liability to the shipper Halm (and, by implication, to ABN) contain a number of provisions purporting to limit liability. The district court granted the defendants' motions for summary judgment in part, ruling that these contractual provisions limited the defendants' liability to $50 each.

The defendants then offered to acquiesce in a judgment against themselves, without conceding liability, each tendering $50. ABN rejected the tenders. The defendants thereupon moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). They argued that their tender of the

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1 As insurer-subrogee, ABN "stands in the shoes" of the shipper Halm. *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999).

maximum amount in dispute mooted the case and deprived the court of subject-matter jurisdiction. The district court entered judgment against defendants in the amount of $50 each and dismissed with prejudice claims for damages in excess of $50. The court explained that the judgment was "not based on the merits but . . . solely on . . . subject matter jurisdiction and the doctrine of mootness." ABN appeals this ruling and the prior ruling limiting the defendants' liability.

We affirm the district court's ruling that the contracts limited the defendants' liability to $50, as well as the court's entry of judgment against each defendant for $50 based on their tenders, and its dismissal of the claim for damages in excess of $50. Moreover, we find that the judgments in ABN's favor constituted final, appealable orders under 28 U.S.C. § 1291. On the other hand, the court erred in its view that the dismissal of the case was based on mootness and lack of subject matter jurisdiction.

I. Background

Viewed in the light most favorable to ABN, the evidence showed the following. Halm was a shipper insured by plaintiff ABN. In the years preceding 2000, Halm had developed an ongoing business relationship with Geologistics, a freight forwarder. Halm had hired Geologistics at least twenty-five times to handle its shipments. On June 13, 2000, Geologistics issued a "House Air Waybill" to indicate that it would forward a printing press for Halm from Holland to Huntington Station, New York. When the printing press reached JFK Airport in New York, Geologistics was contractually obligated to arrange for its delivery to

Huntington Station. Halm gave certain instructions to Geologistics, concerning, *inter alia*, the need to "rig" the unit.

On June 20, 2000, Geologistics retained Art Messenger, a trucker, to transport the press from JFK Airport to Huntington Station. Geologistics had retained Art Messenger for "thousands" of prior shipments. The invoice Art Messenger later sent to Geologistics contained neither terms and conditions, nor limitation of liability. However, Art Messenger and Geologistics had previously entered into a written umbrella agreement dating from 1994, which limited Art Messenger's liability to $50 per shipment unless Geologistics made specific written arrangements indicating otherwise. In June 2000, at the time of the shipment (which was between points in the State of New York), Art Messenger was authorized to carry cargo in interstate shipments,[2] but its license to carry intrastate shipments within the State of New York had lapsed.

On June 20, an agent for Art Messenger picked up the crates containing the cargo at JFK. The agent did not note any damage. He transported the crates by truck to Huntington Station. In doing so, he failed to tie the crates down with "load locks." The next morning, during the unloading at Huntington Station, the crate carrying the press was found to be severely damaged. Upon a survey, the printing press was

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2 Art Messenger was validly registered with the Interstate Commerce Commission, the United States Department of Transportation, and with the Single State Registration System, authorizing it to operate, in interstate trucking, in New York, Connecticut, Massachusetts, and Rhode Island. However, it was not properly authorized for intrastate trucking within the state of New York.

declared to be a total loss, apart from its salvage value. As Halm's insurer, ABN was responsible to Halm for approximately $500,000 in loss, which ABN paid.

On June 27, 2000, Geologistics issued an invoice to Halm for $2,276.68. On the back of the invoice were the standard "Terms & Conditions of Service" approved by the National Customs Brokers and Forwarders Association of America. These Terms & Conditions provided:

> [T]he Customer [Halm] agrees that the Company [Geologistics] shall in no event be liable for any . . . damage . . . to the goods resulting from the negligence or other fault of the Company for any amount in excess of $50 per shipment (or the invoice value, if less) . . . . The Customer has the option of paying a special compensation to increase the liability of the Company in excess of $50 per shipment in case of any . . . damage . . . from causes which would make the Company liable, but such option can be exercised only by specific written agreement made with the Company prior to shipment which agreement shall indicate the limit of the Company's liability and the special compensation for the added liability by it to be assumed.

These were the same Terms & Conditions as appeared in the approximately twenty-five prior Geologistics invoices to Halm dating from 1997. Halm had neither requested additional coverage nor paid special compensation to increase the level of liability.

In June 2001, as Halm's subrogee, ABN (along with another insurer) brought this suit against Geologistics

and Art Messenger, claiming (1) breach of contract, (2) breach of bailment obligations, and (3) negligence.[3]

A. The Liability-Limitation Ruling

The parties cross-moved for summary judgment. On April 1, 2003, the district court denied ABN's motion and granted the defendants' motions in part, ruling that the liability of each defendant was limited to $50. *ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 253 F. Supp. 2d 757 (S.D.N.Y. 2003) ("*ABN Amro I*").

The court noted that under New York law,[4] a non-carrier freight forwarder such as Geologistics, which arranges for carriage, will normally not be liable to the shipper for damage sustained during carriage unless its selection of carriers was negligent. *See id.* at 764. The court explained that while a forwarder as a general matter cannot "insulate itself from damages caused by grossly negligent conduct," New York law does not bar a non-carrier freight forwarder from contracting for limitations on its liability for negligent conduct. *Id.* at

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3 The other insurer, Hartford Fire Insurance Company, has elected not to join ABN on this appeal. In addition, Art Messenger impleaded DHL Airways, the company that had shipped the machine by air to JFK Airport in New York. DHL never made an appearance. It appears that DHL was not served with a third-party complaint. It has no involvement in the present appeal.

4 Based on the agreement of the parties, we treat New York law as the law governing this case. *See ABN Amro I*, 253 F. Supp. 2d at 764 ("The parties agree that New York law applies to this dispute. The Geologistics sales invoice, issued from the New York office, specifies that New York law applies, and the machine was damaged during a shipment entirely within the state." (citation omitted)).

765 (quotation marks omitted) (citing *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992)). Applying these principles, the court found that Geologistics had contracted with Halm to limit its liability to $50 per package, even in cases of its negligence, either in the selection of a carrier or otherwise. While a question of fact remained as to "whether Geologistics *negligently* selected Art Messenger," there was "no question of fact concerning any more culpable conduct – recklessness or intentional wrongdoing – by Geologistics." *Id.* at 767 (emphasis added). The court concluded that the liability of Geologistics was limited to $50.

The court then turned to ABN's claims against Art Messenger and explained its rulings as follows: In the absence of a contract to the contrary, a common carrier (which the district court assumed Art Messenger to be)[5] will normally be liable to a shipper for damage caused by its negligence. The court explained further that the carrier may contractually limit its liability for negligent conduct if the common carrier offers the shipper an election to escape the limitation upon payment of a higher fee. *See Calvin Klein Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191 193-94 (2d Cir. 1989) ("A shipper and a common carrier may contract to limit the carrier's liability in cases of loss to an amount agreed to by the parties, so long as the language of the limitation is clear, the shipper is aware of the terms of the limitation, and the shipper can change the terms by indicating the true value of the

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5 The parties dispute on appeal whether Art Messenger is a common carrier or a contract carrier. Judge Chin appeared to assume that Art Messenger was a common carrier. *See, e.g., ABN Amro I*, 253 F. Supp. 2d at 765. Because our disposition does not turn in any way on this issue, we need not decide whether that assumption was correct.

goods being shipped." (citing N.Y.U.C.C. § 7-309(2)) (citation omitted)).

The court found that, because Geologistics acted as Halm's agent in retaining Art Messenger to carry Halm's cargo, the terms of the contract between Geologistics and Art Messenger specified the conditions under which ABN could sue Art Messenger and limited Art Messenger's liability to $50. Art Messenger apparently issued neither an invoice setting the Terms & Conditions of the shipment, nor a bill of lading or a tariff. Nonetheless the longstanding, oral and written umbrella agreement between Geologistics and Art Messenger in effect since 1994 limited the carrier's liability. *See ABN Amro I,* 253 F. Supp. 2d at 769.

The court also considered ABN's argument that Art Messenger faced liability for illegal or reckless conduct going beyond mere negligence, primarily because Art Messenger transported the shipment within the State of New York without a valid permit for intrastate trucking. However, the court found no justification for a finding of fault more extreme than negligence. *Id.* at 766, 768.

The district court also rejected ABN's contention that the broad scope of the limitation provisions – which ABN argued would limit liability even in cases of recklessness or illegal conduct – violated public policy and should therefore be voided. In sum, the court found that the liability of each defendant was limited to $50.

B. The Entry of Judgment

On April 15, 2003, the district court denied the plaintiff's motion for reconsideration. Under 28 U.S.C. § 1292(b), the court certified for interlocutory appeal

its ruling on the limitation of liability. *ABN AMRO Verzekeringen BV v. Geologistics Ams., Inc.*, No. 01 Civ. 5661, 2003 WL 21543529 (S.D.N.Y. July 9, 2003). This court, however, declined to accept the interlocutory appeal. *ABN AMRO Verzekeringen BV v. Geologistics Ams., Inc.*, No. 03-8036 (2d Cir. Jan. 20, 2004).

In late 2004, at Judge Chin's suggestion the defendants each tendered $50 to ABN, effectively consenting to judgment in that amount, and moved to dismiss the action insofar as ABN sought any greater damages. Judge Chin entered a judgment in favor of ABN against each of Geologistics and Art Messenger for $50, and dismissed with prejudice ABN's claims for damages in excess of $50. *ABN AMRO Verzekeringen BV v. Geologistics Ams., Inc.*, No. 01 Civ. 5661, 2005 WL 774281 (S.D.N.Y. Apr. 5, 2005). The court further observed that although Geologistics and Art Messenger admitted neither to liability nor fault, the case was moot because the defendants had tendered, and judgment had been entered for, all that ABN "could recover if the case were to be tried." *Id.* at *1. The court concluded that no party retained the necessary "legally cognizable interest in the outcome," *id.* at *3, and that the court therefore no longer had subject-matter jurisdiction over the litigation, *id.* at *1.[6]

II. Discussion

On appeal, ABN argues that the district court erred in entering judgment without requiring the defendants to concede liability. In addition, ABN challenges the court's findings limiting the defendants' liability. While

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6 In an order accompanying the ruling, the court noted that all the parties would retain the ability to reassert their claims and defenses in the event that this court reversed his ruling limiting the defendants' liability.

we disagree with part of the court's reasoning, we find no fault with the court's conclusion that the defendants' liabilities were limited to $50, or with entry of final judgment for $50 against each defendant concluding the action.

A. The Entry of Final Judgment

1. Finality

The district court's judgment was a final, appealable order. "A 'final decision' within 28 U.S.C. § 1291 . . . 'is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Taylor v. Bd. of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961) (Friendly, *J.*) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); *cf. Taylor*, 288 F.2d at 602 ("An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability . . . ."). Though the court did not resolve the issue of defendants' liability, its decision was nevertheless final, because all claims in the case had been resolved. In entering judgment, the court awarded against each defendant the maximum amount for which the defendant could, according to the court's ruling, be held liable, and rejected with prejudice plaintiff's claims insofar as they sought further damages. Thus, the court had ruled on all the relief demanded by the complaint, and nothing remained for the court to do but enter and execute the judgment. If the plaintiff's appeal seeking to overturn the ruling limiting liability proves unsuccessful, the case is at an end. *See Abrams v. Interco Inc.*, 719 F.2d 23, 32 (2d Cir. 1983) (Friendly, *J.*) (exercising appellate jurisdiction in

a case in which the district court denied plaintiffs' class-action certification motion and granted judgment for plaintiffs on their personal claims – even though plaintiffs had rejected defendant's offer of full relief for those claims – subject to the plaintiffs' right to renew their personal claims if the certification ruling were overturned); *see also Sompo Japan Ins. Co. v. Union Pac. R.R. Co.*, 456 F.3d 54, 55 n.2 (2d Cir. 2006) (holding that appealable final judgment was entered where district court ruled in defendant's favor on limitation of liability and parties then stipulated to final judgment in plaintiff's favor in that amount, subject to revocation in event of appellate reversal of ruling limiting liability); *Purdy v. Zeldes*, 337 F.3d 253, 257-58 (2d Cir. 2003) (holding that appealable final judgment had been entered when district court granted summary judgment to defendants on two of plaintiff's three claims, while denying summary judgment on the third, and granted plaintiff's motion for voluntary dismissal of the third claim without prejudice to refiling in event of reversal on appeal of the dismissal of either of the other claims).

2. Judgment Without a Finding of Liability

ABN contends that it was improper for the district court to enter judgment in its favor without first finding, or requiring the defendants to concede, liability. ABN proffers the argument somewhat apathetically, which is understandable as it makes little sense.[7] ABN's position would require either that

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7 It appears that ABN is making this argument only to protect against any risk that it might be deemed to have forfeited its right to appeal the court's finding limiting liability. As it made clear to the district court in seeking the

the court refrain from entering judgment although all the issues upon which that judgment depends were settled (either by factual determination or concession), or that, as a prerequisite to judgment, the court conduct a trial of factual issues that could have no effect on the judgment. Having determined that ABN could recover no more than $50 from each defendant, the court would be required, on ABN's view, to hold a full trial on liability and damages, notwithstanding defendants' willingness to offer ABN complete relief on its remaining claims. It would make no sense to impose such requirements. Where a defendant has consented to judgment for all the relief the plaintiff can win at trial (according to the trial court's determination), the defendant's refusal to admit fault does not justify a trial to settle questions which can have no effect on the judgment. *See Abrams*, 719 F.2d at 32 ("[T]here is no justification for taking the time of the court and the defendant in the pursuit of minuscule individual claims which defendant has more than satisfied.").

ABN's suit was only for money damages.[8] The court had ruled as a matter of law that ABN could not recover more than $50 from each defendant. When

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§ 1292 certification and to this court at oral argument, ABN has no interest in litigating the defendants' liability if this court sustains the district court's finding of a $50 cap on liability. It appears that ABN rejected the defendants' $50 tenders – and has objected to the district court's judgment in its favor – lest it be deemed by acquiescence to have forfeited the right to challenge the liability-limitation ruling.

8 Plaintiff made no demand for declaratory relief on liability. We do not decide whether this judgment could properly be entered over the plaintiff's objection if the complaint included such a demand.

each defendant tendered that amount, nothing of significance remained to adjudicate. Thus, the district court correctly rejected ABN's claim that the court should have mandated trial on an issue that had no practical consequence. See id. (affirming judgment where the district court denied plaintiffs' class-action certification motion and granted judgment for plaintiffs on their individual claims – despite plaintiffs' rejection of defendant's offer of full relief for those claims).

3. Mootness and Lack of Subject Matter Jurisdiction

The district court believed that, once the defendants tendered $50, the parties no longer had "a personal stake" or a "legally cognizable interest" in the litigation and that as a consequence the case had become moot, and the court was compelled to dismiss it for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See Fox v. Bd. of Trs.*, 42 F.3d 135, 140 (2d Cir. 1994). While the court properly granted final judgment to the plaintiff for $50 and denied the plaintiff's claims insofar as they sought a greater recovery, the court was mistaken in believing that the case had become moot and that the court lacked jurisdiction. The court confused the mootness *of an issue* with mootness of a case or claim in the Constitutional sense. If the case had truly become moot and the court had lacked subject matter jurisdiction, the court would have been without power to enter a judgment in plaintiff's favor for $50 and in defendants' favor as to the balance of the plaintiff's claim. It would have been compelled simply to dismiss, leaving the dispute unadjudicated. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983).

Mootness, in the constitutional sense, occurs when the parties have no "legally cognizable interest" or practical "personal stake" in the dispute, and the court is therefore incapable of granting a judgment that will affect the legal rights as between the parties. *See Davis v. New York*, 316 F.3d 93, 99 (2d Cir. 2002) ("Under Article III, section 2 of the Constitution, federal courts lack jurisdiction to decide questions that cannot affect the rights of litigants in the case before them."). There is no issue of practical importance for the court to adjudicate.

Mootness can arise in many ways during the course of litigation. If, for example, the plaintiff dies or ceases to be subject to the condition that caused his deprivation before his request for prospective injunctive relief is resolved, his claims may in some circumstances become moot. *See, e.g., Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (where two plaintiff-prisoners sued prison authorities seeking injunction allowing them to subscribe to a magazine, the case was mooted by the death of one plaintiff and the release of the other). In such circumstances, there is no longer a "Case" or "Controversy" within the meaning of Article III. Lacking subject-matter jurisdiction, the court must dismiss the case or claim. *See Preiser v. Newkirk*, 422 U.S. 395, 401-04 (1975).

Those, however, were not the circumstances of this case when the defendants consented to judgment for $50. The parties continued to have a personal stake in a practical dispute, and a legally cognizable interest in the litigation. The court remained capable of granting a judgment with practical consequences for the parties, and it did so. ABN was demanding an award of $500,000, and continues to do so during this appeal. The defendants argued successfully, and continue on

this appeal to argue, that as the result of Halm's contractual commitment, binding on plaintiff, the damages could not exceed $50. The court agreed with the defendants' argument and so ruled. Each defendant consented to judgment against itself in the amount of $50, which the court entered. The defendants' consent to judgment against them in the amount of $50 satisfied only a tiny portion of the $500,000 dispute between the parties, as the plaintiff continues to demand the full $500,000. The parties thus retained a practical stake in the dispute, and the court continued to be capable of rendering a judgment that would have a practical effect on the legal rights of the parties. There was no mootness of the sort that deprives the court of subject matter jurisdiction.

It is true that, as the result of the defendants' consent to judgment for $50, a different kind of mootness arose. *Certain issues* that would otherwise have been in dispute became moot, in the sense that the court no longer needed to resolve them. The question of the defendants' liability to the plaintiff, and all questions subordinate to it, ceased (at least conditionally) to have practical importance. Because the court ruled that the defendants' liability could not exceed $50 and the defendants consented to judgment in that amount, it no longer mattered whether, as ABN claimed, Geologistics had contracted with Halm to arrange for the transportation of the printing press, Geologistics acted negligently in engaging Art Messenger, Art Messenger acted negligently in trucking the cargo, the printing press was in sound condition when shipped and suffered damage during the carriage, the damage was caused by Art Messenger's negligence, or ABN had insured Halm and been subrogated to Halm's claim by paying it for the

loss. So long as the district court's ruling limiting the liability to $50 remained in force, all litigable *issues* pertaining to the defendants' liability ceased to have practical importance, because of the defendants' tender of that amount. The *case*, however, was not moot, and the court did not lose subject matter jurisdiction.[9]

Abrams v Interco Inc., 719 F.2d 23 (2d Cir. 1983), upon which the district court relied, is not to the contrary, as the circumstances in that case were quite different from ours. In *Abrams*, two plaintiffs brought an action alleging that the defendant violated the antitrust laws, and they sought treble damages for themselves, as well as on behalf of a large, similarly situated class. The district court denied class certification, based on its finding that common issues did not predominate over individual issues. The defendant then, without conceding liability, tendered to the plaintiffs an amount larger than the amount to which the plaintiffs claimed personal entitlement as damages, which the plaintiffs refused. The district court thereupon granted the defendant's motion to dismiss for lack of jurisdiction on the ground that no

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9 The court apparently believed that its observations on mootness and lack of jurisdiction would preserve the freedom of the parties "to assert their claims and defenses in the event [the district court's] . . . limitation ruling is reversed on appeal or the case is otherwise remanded by the appellate court for a trial on the question of negligence." That ruling, however, was neither necessary nor efficacious to accomplish the desired goal. If we (or the Supreme Court) were to vacate the finding limiting liability to $50, the defendants, having made no admission of fault or liability, and having suffered no adverse adjudication on those issues, would remain fully free to litigate them. The plaintiff also would be free to prove the defendants' fault and liability in the full amount of its claim.

justiciable case or controversy remained before the court. The dismissal preserved the right of the plaintiffs to appeal the denial of class certification, and by implication provided that, in the event of a reversal of the denial of class certification, the plaintiffs' individual claims would be reinstated so as to permit them to maintain the suit on behalf of the class. The court of appeals upheld the dismissal of the plaintiffs' individual claims for lack of jurisdiction predicated on mootness. *Id.* at 32.

The difference between our case and *Abrams* is crucial to the question of constitutional mootness. In *Abrams*, insofar as concerned the plaintiffs' individual claims for damages, the defendant tendered every cent (and more) to which the plaintiff claimed entitlement. Accordingly, with respect to the plaintiffs' individual claims for damages, nothing of practical significance remained to adjudicate. In our case, by contrast, the defendants tendered only a portion – indeed, only a small portion – of the damages plaintiff claimed. The district court's ruling that the plaintiff had no entitlement to any amount exceeding what the defendants had tendered *resolved* the dispute between the parties but did not negate its existence. The parties were in disagreement over whether the defendants' liability was limited by the contract and consequently over how much plaintiff could receive in damages. There unquestionably was, and still is, a case and controversy for the court to adjudicate. The defendants' tender of $50 did not moot the plaintiff's claim for $500,000.[10]

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10 We recognize that there is an apparent similarity between this case and *Abrams*, which understandably misled the district court. It is that in neither *Abrams* nor this case did the plaintiffs receive *everything* they sought. In

To the extent that the judgment stated that it "is not based on the merits but is based solely on the issue of subject matter jurisdiction and the doctrine of mootness," it was in error. The court's judgment, awarding $50 to the plaintiff and denying the plaintiff's claim for any further sum, was a binding adjudication of each defendant's obligation to pay $50 and no more, notwithstanding that the court's justification depended in part on a concession by the defendants, which made it unnecessary to litigate certain potentially disputed issues. We therefore strike from the judgment the assertion in Paragraph 3 that the judgment is "not based on the merits but . . . solely on . . . mootness."[11]

Abrams, the plaintiffs sought and were denied class certification. Their demand for class certification was, however, collateral and extraneous to their claim of personal entitlement to damages. It is the *Abrams* plaintiffs' substantive claim for damages that was mooted by the defendant's tender of more than the entitlement the plaintiffs claimed. In this case, by contrast, there was no mooting of the plaintiff's claim, as the defendants' tender was for only a tiny portion of the money damages the plaintiff claimed. There is no reason to believe that we would have found mootness in *Abrams* if the district court had first ruled, for example, that the plaintiff was entitled to no more than its actual damages, rather than treble damages, and the defendant had then tendered only the amount of the actual claimed loss, without trebling.

11 To protect the defendants against the risk of misinterpretation of the basis for the judgment in other litigation, the district court remains free to explain in a ruling accompanying the judgment, if requested by the defendants, that the judgment in plaintiff's favor is not based on a finding of fault or liability, but rather on the defendants' consent to the entry of judgment for $50 without either admission or determination of liability.

B. The Limitation of Art Messenger's Liability

ABN also contends the court erred in ruling that the defendants' liability was limited to $50. It argues that the agreement between Geologistics and Art Messenger, purporting to limit Art Messenger's liability to $50, was invalid for two reasons: First, because Art Messenger's limitation of liability was not set forth in a bill of lading, receipt, or tariff, it was not entitled to recognition under the Halm-Geologistics contract. Second, Art Messenger's limitation of liability is void as contrary to public policy, because it limits Art Messenger's liability even for damages arising from illegal conduct, such as intrastate trucking in violation of New York state statute.[12] Neither argument has merit.

1. Art Messenger's Failure to Issue a Bill of Lading, Receipt, or Tariff

Seeking to invalidate the limitation of Art Messenger's liability, ABN notes that Art Messenger did not issue a bill of lading, receipt, or tariff in conjunction with the transport of the printing press. This is relevant, ABN argues, because Halm's contract with Geologistics, as set forth in the sales invoice issued by Geologistics, provided that when Geologistics hired carriers to transport Halm's cargo, Halm would be subject to limitations specified by such carriers in

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12 In its reply brief, ABN contends that a provision exempting Art Messenger from liability even for willful or grossly negligent acts is contrary to public policy and void. We decline to consider an argument raised for the first time in a reply brief. *See United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003).

their bills of lading, receipts, and tariffs. ABN argues that in the absence of a bill of lading, receipt, or tariff, no liability limitation can apply.[13]

Under the Halm-Geologistics contract, Geologistics became Halm's agent for the purpose of engaging a carrier to transport Halm's cargo. A shipper in Halm's position generally can recover contract-based damages from a secondary carrier, such as Art Messenger, based on the theory that the freight forwarder (here, Geologistics) acted as agent for the shipper in engaging the carrier. "As agent for [the shipper], [the freight forwarder has] the authority to enter into a usual and customary shipping contract . . . ." *St. Laurent v. Air Freight Transp. Corp.*, 86 A.D.2d 511, 512-13 (N.Y. App. Div. 1982) (internal quotation marks omitted); *see also Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 34 (2004) (holding that "an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers"). Halm's contract with Geologistics contains Terms & Conditions which authorize Geologistics "to select and engage carriers . . . to transport [Halm's] goods." They also provide that such carriers "shall be considered as the agents of" Halm, and that "the goods may be entrusted to such agencies subject to [certain] conditions as to limitation of liability" set forth by those carriers. Thus, Halm's contract with Geologistics authorized Geologistics to engage carriers on Halm's behalf and expressly authorized Geologistics to accept limitations of liability imposed by the retained carriers.

Pursuant to its authorization to retain carriers on Halm's behalf, Geologistics retained Art Messenger to carry Halm's cargo. The terms of Art Messenger's

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13 ABN neither argues that it entered into a contract directly with Art Messenger nor points to any authority indicating that Art Messenger owed it a common-law duty.

employment by Geologistics, which had been in effect since 1994, and were memorialized in a letter dated October 3, 1998, included a limitation of Art Messenger's liability to $50 per shipment unless Geologistics declared a higher value.[14] ABN contends, however, that Halm authorized Geologistics to accept the liability limitations imposed by retained carriers only when those limitations were set forth in bills of lading, receipts or tariffs. As noted above, ABN relies on a provision in the Geologistics sales invoice labeled "LIABILITY LIMITATIONS OF THIRD PARTIES," which states:

> [Geologistics] is authorized to select and engage carriers . . . to transport . . . the goods, all of whom shall be considered as the agents of [Halm], and the goods may be entrusted to such agencies subject to all conditions as to limitation of liability for [damage] and to all rules, regulations, requirements and conditions, whether

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14 Art Messenger's letter of October 3, 1998, stated as follows:

> PLEASE BE ADVISED THAT THE LIABILITY INFORMATION SUBMITTED TO YOU, IS FOR YOUR COMPANY RECORD, AND SHOULD BE MAINTAIN[ED] IN YOUR COMPANY FILES. LIMIT OF LIABILITY. THE LIABILITY OF ART MESSENGER & DELIVERY SERVICE SHALL BE LIMITED TO FIFTY DOLLARS (50.00) PER SHIPMENT UNLESS THE CUSTOMER [*i.e.*, Geologistics] MAKES SPECIFIC WRITTEN ARRANGEMENTS WITH ART MESSENGER & DELIVERY SERVICE TO SPECIFY A HIGHER DECLARED VALUE.

> printed, written or stamped, appearing in bills of lading, receipts or tariffs issued by such carriers . . . .

We do not agree that this provision carries the meaning ABN ascribes to it. ABN reads the term "appearing on bills of lading, receipts or tariffs" as a limitation, so that a contractual condition or limitation of liability set forth in a document which is not a bill of lading, receipt, or tariff would not come within Halm's authorization of Geologistics to accept. The defendants, in contrast, read this provision as an expansive authorization to Geologistics to accept written limitations of liability embodied in contracts of carriage it made on Halm's behalf, rather than as a narrowing limitation giving authorization only as to those limitations appearing on bills of lading, receipts, or tariffs.

Although the matter is not free of ambiguity, we believe the defendants' understanding is the more reasonable interpretation of the contract. The contractual terms, "subject to all conditions . . . whether written, printed or stamped, appearing on bills of lading, receipts or tariffs" appears designed to give Geologistics broad authorization to contract with carriers on Halm's behalf, accepting the carriers' written limitations of liability. ABN advances no reasonable argument why the contract should be understood to authorize only those limitations set forth in bills of lading, receipts, and tariffs, but not those set forth in other forms of written contract. Such a reading would defeat legitimate, expressly negotiated contractual expectations, solely because of the meaningless circumstance of the type of document in which the contractual term was stated. Nor does ABN

point to evidence which would favor its improbable reading of the ambiguous contract term.

We conclude that Halm's contract with Geologistics authorized Geologistics, in engaging Art Messenger on Halm's behalf, to bind Halm to the terms of limitation of liability set forth in writing in the umbrella agreement between Geologistics and Art Messenger. We reject ABN's contention that such a limitation was authorized only if set forth in a bill of lading, receipt, or tariff.

2. Violations of New York Law

ABN argues that this court must disregard Art Messenger's contractual limitation of liability as contrary to public policy because it purports to limit liability even for illegal conduct. Art Messenger concedes that, in violation of various New York state statutes, it carried the shipment intrastate without having maintained its license to operate as an intrastate carrier. In addition, ABN asserts that Art Messenger violated New York Law by failing to file a tariff schedule, as required by Transportation Laws §§ 98 and 103, or a rate schedule, as required by Transportation Laws §§ 181 and 103.[15]

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15 These statutes provide:

Every common carrier shall file with the commissioner and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state . . . .

N.Y. Transp. Law § 98.

No common carrier subject to the provisions of this chapter shall engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter.

ABN contends it is "axiomatic" under the New York Transportation Law that to limit liability for damage to goods in intrastate transit, a trucker must be validly licensed by the State of New York, and that the court must treat Art Messenger's contractual protections as a nullity by reason of its violations of these New York statutes. It is, however, by no means axiomatic under New York law that a carrier forfeits its rights under its contract of carriage if it operates in violation of these statutes. ABN cites no New York authorities which support its proposition. The question is whether, in implementing the statute at issue, the legislature intended that violation result in the carrier's loss of its contractually agreed protections. *See, e.g., Concord Indus., Inc. v. K.T.I. Holdings, Inc.*, 711 F. Supp. 728, 729 (E.D.N.Y. 1989) ("[W]hen a congressional statute provides specific penalties for violations, a court should not affix the additional sanction of rendering a private contract void unless the legislative history evinces such an intent; it is inappropriate to add judicially to the remedies provided by the statute." (citing *Kelly v.*

N.Y. Transp. Law § 103(1).

> Every common carrier of property by motor vehicle shall, upon demand, issue either a receipt or a bill of lading for all property delivered to it for transportation. . . . [W]hen expressly authorized or required by order of the commissioner a carrier may establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released and shall not, so far as relates to values, be held to violate this article.

N.Y. Transp. Law § 181.

Kosuga, 358 U.S. 516, 519 (1959)); *Bruce's Juices, Inc. v. Am. Can Co.*, 330 U.S. 743, 755 (1947)); *accord Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 68 F. Supp. 2d 263, 270 (W.D.N.Y. 1999); *cf. John E. Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 278 (1937) ("If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied.").

We do not read these New York statutes as imposing forfeiture of a carrier's contractual protections as a consequence of violation. Nothing in the text of the statutes suggests such a consequence. Furthermore, Transportation Law § 181, on which ABN heavily relies, provides that a common carrier shall issue a receipt or bill of lading "upon demand." There is no evidence that Geologistics or Halm made any such demand.[16]

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16 In its reply brief, ABN cited for the first time New York Transportation Law § 111. *See* N.Y. Transp. Law § 111 ("In case a common carrier . . . shall omit to do any act . . . required to be done, either by law or by order of the commissioner, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury *caused thereby or resulting therefrom* . . . ." (emphasis added)). ABN has never contended its loss was caused by or resulted from Art Messenger's violations of statute. Furthermore, we decline to consider an argument raised for the first time in a reply brief. *See United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003).

C. The Limitation on the Liability of Geologistics

ABN also argues that the district court should not have enforced the liability-limiting provision of the Halm-Geologistics contract, which limits the liability of Geologistics to $50. First, ABN argues that the provision does not limit liability where Geologistics is negligent in its selection of carriers. Second, ABN argues that even if this court finds that Geologistics and Halm *did* intend their contract to limit liability in the case of negligence, the scope of that limitation was so sweeping as to render the contract contrary to law and public policy.[17] We reject both arguments.

1. The Halm-Geologistics Contract

ABN's argument against enforcement of the contractual limitation of its liability proceeds as follows. Courts closely scrutinize agreements exculpating negligent parties and construe such agreements against the drafter. *See, e.g., Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 341 (1998). The liability-limitation provisions are ambiguous and "designed to mislead," because they appear to limit liability even when Geologistics fails to keep its express promise to "use reasonable care in the selection of carriers." The court should construe the

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17 In addition to advancing these two arguments, ABN appears to claim in passing that the selection of Art Messenger was not "valid consideration" for the Geologistics contract with Halm, and that Geologistics was acting as the "alter ego" of Art Messenger. ABN does not, however, clarify these claims further, and they appear, in any case, to be either duplicative of ABN's other claims or entirely specious.

contract as not providing for limitation of liability, at least where Geologistics was negligent in the selection of a carrier.

At issue are five provisions of the Halm-Geologistics contract: Paragraph 1 (Services by Third Parties); Paragraph 2 (Liability Limitations of Third Parties); Paragraph 6 (Declaring Higher Valuation); Paragraph 8 (Limitation of Liability); and Paragraph 10 (Liability of Company). These provide:

> **(1) SERVICES BY THIRD PARTIES:** Unless the Company [*i.e.*, Geologistics] carries, stores or otherwise physically handles the shipment, and [damage] occurs during such activity, the Company assumes no liability as a carrier and is not to be held responsible for any [damage] to the goods to be forwarded or imported except as provided in paragraph 10 and subject to the limitations of paragraph 8 below, but *undertakes only to use reasonable care in the selection of carriers* . . . and others to whom it may entrust the goods for transportation . . . . When the Company carries, stores or otherwise physically handles the shipment, it does so subject to the limitation of liability set forth in paragraph 8 below unless a separate bill of lading, air waybill or other contract of carriage is issued by the Company, in which event the terms thereof shall govern.
>
> **(2) LIABILITY LIMITATIONS OF THIRD PARTIES:** The Company is authorized to select and engage carriers . . . to transport . . . the goods, all of whom shall be

considered as the agents of the Customer [*i.e.*, ABN-Halm], and the goods may be entrusted to such agencies subject to all conditions as to limitation of liability for [damage] and to all rules, regulations, requirements and conditions, whether printed, written or stamped, appearing in bills of lading, receipts or tariffs issued by such carriers . . . . *The Company shall under no circumstances be liable for any [damage] to the goods for any reason whatsoever when said goods are in custody, possession or control of third parties selected by the Company to . . . transport* or render other services with respect to such goods.

(6) DECLARING HIGHER VALUATION: Inasmuch as . . . carriers . . . usually limit their liability for [damage] unless a higher value is declared and a charge based on such higher value is agreed to by said [carriers], *the Company must receive specific written instructions from the Customer to pay such higher charge based on valuation and the [carrier] must accept such higher declared value, otherwise* the valuation placed by the Customer on the goods shall be considered solely for export or customs purposes and *the goods will be delivered* to the [carriers], *subject to the limitations of liability set forth herein in paragraphs 8-10* below with respect to any claim against the Company *and subject to the provisions of paragraph 2 above.*

(8) LIMITATION OF LIABILITY: . . . *[T]he Customer agrees that the Company shall*

in no event be liable for any [damage] to the goods resulting from the negligence or other fault of the Company for any amount in excess of $50 per shipment (or the invoice value, if less) . . . . *The Customer has the option of paying a special compensation to increase the liability of the Company in excess of $50 per shipment* in case of any [damage] from causes which would make the Company liable, but such option can be exercised only by specific written agreement made with the Company prior to shipment which agreement shall indicate the limit of the Company's liability and the special compensation for the added liability by it to be assumed.

(10) LIABILITY OF COMPANY: Subject to the provisions of 19 CFR Section

111.44 [a regulation that formerly restricted the extent to which a freight forwarder could limit its liability, but which has since been revoked], *it is agreed that any claim or demand for [damage] shall be only against the carriers . . . or others in whose actual custody or control the goods may be at the time of such [damage], and that the Company shall not be liable or responsible* for any claim or demand from any cause whatsoever, *unless in each case the goods were in actual custody or control of the Company* and the damages alleged to have been suffered be proven to be caused by the negligence or other fault of the Company, its officers or employees, in which event the limitation of liability set forth in paragraph 8

herein shall apply . . . .

There is indeed arguable inconsistency between the undertaking of Geologistics in Paragraph (1) to "use reasonable care in the selection of carriers" and the provisions of Paragraphs (2) and (10) to the effect that Geologistics can have no liability for damage to goods in the custody of third parties selected by Geologistics. If these were the only pertinent provisions, ABN could reasonably argue that the court must nullify the exculpation provisions in order to give meaning to the obligation to use reasonable care in the selection of the carrier. But that argument disappears when one takes into account the provisions of Paragraphs (6) and (8) to the effect that Geologistics can be liable for the full value of the goods if the customer had declared their value and agreed to pay higher charges, or else Geologistics is liable for a maximum of $50. Considering all these provisions together, no reasonable reading of the contract as a whole would support the proposition that Geologistics can be liable in excess of $50 for damage suffered by the goods while in the possession of the carrier, based on its negligent selection of the carrier, absent a declaration by the shipper of full value with agreement to pay higher charges. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) ("The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect."); *cf. id.* (noting that where there is "an inconsistency between a specific provision and a general provision of a contract . . . , the specific provision controls.").

2. The Scope of the Limitation of Liability

Finally, ABN argues that the limitation provisions of the Halm-Geologistics contract were invalid on public policy grounds because they purport to relieve Geologistics of any meaningful responsibility even for gross negligence or intentional wrongdoing.[18] *See Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992) ("[W]hile . . . exculpatory and limitation of liability clauses are enforceable against claims of ordinary negligence, those clauses cannot restrict . . . liability for conduct evincing a reckless disregard for . . . customers' rights.").

ABN's argument has no application to "ordinary" negligence. The doctrine upon which it relies applies only in cases of more egregious misconduct. The district court found that ABN failed to raise a material issue of fact as to whether Geologistics engaged in conduct more culpable than ordinary negligence. *ABN Amro I*, 253 F. Supp. 2d at 767. In its initial brief to this court, ABN does not appear to challenge this finding. It makes no citation to the record and does not point to evidence which it contends should support a finding of reckless disregard or intentional misconduct. Even if ABN were correct that the liability-limitation provision is unenforceable as to its

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18 Because the $50 limitation constitutes a nominal sum, New York courts will treat that limitation – for the purpose of determining the efficacy of liability-limitation provisions – as though it offered complete relief from liability. *See Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992) ("It is the public policy of this State . . . that a party may not insulate itself from damages caused by grossly negligent conduct," a principle that "applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum.").

exculpation of reckless or intentional misconduct, that conclusion would not vitiate the provision's limitation of liability to $50 for ordinary negligence – which is the only wrongdoing at issue here. We have considered all of ABN's remaining arguments and find them to be without merit.

III. Conclusion

The judgment of the district court is affirmed.

United States District Court
Southern District of New York

App. B

ABN AMRO VERZEKERINGEN BV,
Plaintiff,

-against-

Memorandum Decision
01 Civ 5661 (DC)

GEOLOGISTICS AMERICAS, INC. and ALFRED JAMES d/b/a Art messenger and Delivery Service,
Defendants.

Appearances: (See last page)

CHIN, D..J

Defendants Geologistics Americas, Inc. ("Geologistcs") and Alfred Jame d/b/a Art Messenger and Delivery Service ("Art Messenger") move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) (1) based on defendants' offers to pay plaintiff ABN AMRO Verzekeringen BV ("ABN") the maximum amount plaintiff could rcover at trial. For the foregoing reasons, defendants' motions are granted.

STATEMENT OF THE CASE

This is a diversity case to recover for damage to a large envelope printing press during shipping from Europe to the United states. Geologistics was the freight-forwarder and customs broker, and Art Messenger was the New York trucker. This Court's opinion dated March 31, 2003 denied summary judgment to all parties

as to liability, but granted partial summary judgment in favor of defendants, limiting ther liability to $50 each under a package limitation. ABN AMRO Verzekeringen BV v. Geologistics Americas, Inc., 253 F. Supp. 757, 771 (S.D.N.Y. 2003).

Thereafter, the Court granted plaintiff's motion for certification for immediate appeal pursuant to 28 U.S.C. § 1292 (b). ABN AMRO Verzekeringen BV v. Geologistics Americas, Inc., No. 01 Civ. 5661 (DC), 2003 WL 21543529 at * 3 (S.D.N.Y. July 9, 2003). On January 20, 2004, the Second Circuit denied ABN'S petition for leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). The Second Circuit ruled:

> " Appellants have not demonstrated that the District court order [limiting the Appellees' Liability to $50 each] "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [district court] order may materially advance the ultimate termination of the litigation."

ABN AMRO Verzekeringen BV v. Geologistics Americas, Inc., No 03-8036, (2d Cir. Jan. 20, 2004) (quoting 28 U.S.C. § 1292 (b)).

Both defendants have tendered $50 to plaintiff, as the maximum amount plaintiff could recover if the case were to be tried. (See Pantelopoulos Aff. ¶ 3; Letter from Hill Rivkins & Hayden LLP to the Court on 11/19/04 at 1). Neither Geologistics or Art Messenger admits to liability, negligence or fault, but both have tendered the $50 in an effort to render the case moot and to avoid the cost of trying a case where plaintiff's maximum recovery—absent a reversal of this Court's package

limitation ruling on appeal—will be $50. Plaintiff has rejected both tenders because neither defendant concedes liability. Plaintiff argues that by accepting defendants' offers, it could lose its right to appeal this Court's decision on the package limitation.

Both defendants move to dismiss for lack of subject matter jurisdiction, arguing that the case is moot. The issue presented is whether a case or controversy exists in view of defendants' offer to pay plaintiff the maximum amount recoverable at trial.

DISCUSSION

A. Rule 12 (b) (1)

1. Applicable Law

" A case is properly dismissed for lack of subject matter jurisdiction under Rule 12 (b) (1) when the court lacks the statutory or constitutional power to adjudicate the case." Nowak v. Ironworkers Local 6 Pension Fund , 81 F. 3d 1182, 1187 (2d Cir. 1996). As the party "seeking to invoke the subject matter jurisdiction of the district court," the plaintiff bears the burden of demonstrating that there is subject matter jurisdiction in the case. Scelsa v. City Univ. of New York, 76 F. 3d 37, 40 (2d Cir. 1996). If a controversy is moot, then the court lacks subject matter jurisdiction over the action. Church of Scientology v. United States, 506 U.S. 9, 12 (1992); see also Fox v. Bd. of Trs. of the State Univ. of New York, 42 F. 3d 135, 140 (2d Cir. 1994)." A case is moot, and accordingly the federal courts have no jurisdiction over the litigation when the parties lack a legally cognizable interest in the outcome....The required legally cognizable interest has alternatively been described as a requirement that a plaintiff have a personal stake in the litigation. "

Fox, 42 F. 3d at 140 (internal quotations and citations omitted). "Without such a personal stake, a court lacks subject matter jurisdiction and the case must be dismissed." Ambalu v. Rosenblatt, 194 F.R.D. 451, 452 (E.D. N.Y. 2000) (citing Fox , 42 F.3d at 140)). " [A] case becomes moot.....when it is impossible for the court to grant any effectual relief whatever to a prevailing party." In re Kurtzman, 194 F. 3d 54, 58 (2d Cir. 1999); see also Cook v. Colgate Univ., 992 F.2d 17,19 (2d Cir. 1993) (holding that a case becomes moot " when it becomes impossible for the courts, through the exercize of their remedial powers, to do anything to redress the injury").

When a defendant offers the maximum recovery available to a plaintiff, the Second Circuit has held that the case is moot and " there is no justification for taking the time of the court and the defendant in the pursuit of miniscule individual claims which the defendant has more than satisfied." Abrams v. Interco Inc., 719 F. 2d 23, 32 (2d Cir., 1983); see also Weiss v. Fein, Such, Kahn & Shepard, P.C., No 01 Civ. 1086 (AGS), 2002 WL 449653, at * 3 (S.D.N.Y. March 22, 2002) (finding case moot where "defendants' offer of judgment contains all the available relief sought by plaintiff."). If the offer does notcover all potential relief, however, the case is not moot. Siberdky v. Borah, Goldstein, Altschuler & Schwartz, P.C., 242 F. Supp. 2d 273, 278 (S.D.N.Y. 2002); Lovelace v. United States, No. 00 Civ. 1274 (LTS), 2001 WL 984686, at *3 (S.D.N.Y. Aug . 27, 2001) (holding case not moot because defendant "fails to provide plaintiff with all to which he would be entitled").

Courts have had occasion to consider the issue of mootness in situations similar to the one presented here. These cases are typically filed as class actions, where prior to class certification defendant offers plaintiff the maximum amount that plaintiff could recover at trial. See

e.g. , Abrams , 719 F.2d at 25; Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir., 1991); Grief v. Wilson, Moskowitz, Edelman & Dicker LLP, 258 F. Supp. 2d 157, 159-60 (E.D.N.Y. 2003); Ambalu, 194 F.R.D. at 452-53; Weiss, 2002 WL 449653, at *3; Edge v. C. Tech Collections, Inc., 203 F.R.D. 85,87 (E.D.N.Y. 2001); Tratt v. Retrieval Masters Creditors Bureau, Inc., No. 00-CV-4560 (ILG), 2001 WL 667602, at *2 (S.D.N.Y. May 23, 2001).

These cases uniformly find it proper to dismiss a complaint for lack of subject matter jurisdiction when a plaintiff is offered all that the plaintiff could recover at trial. The "offers" in the above cited cases were Rule 68 offers of judgment..[1] Other courts followed this reasoning but denied a defendant's motion to dismiss where the Plaintiff could potentially recover more than the offer submitted by the defendant. See, e.g., Sibersky, 242 F.

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[1] On September 20, 2004 and October 22, 2004 respectfully, Art Messenger served two Rule 68 offers of judgment on Plaintiff. These offers were rejected. Geologistics submitted a "tender" of judgment on or about November 19, 2004. Whether defendants tendered the $50 through a confession of judgment, offer of judgment, or tender is irrelevant to the ultimate conclusion, as both defendants have expressed a willingness to have judgment entered against them for $50 to avoid continuing this litigation.

Supp. 2d at 278; Lovelace, 2001 WL 984686, at*3; Hennessey v. Conn. Valley Fitness Ctrs., Inc., No. CV980504488S, 2001 WL 1199840 (Conn. Super. Sept. 12, 2001) (" [T]his court finds that the offer of judgment failed to provide complete relief and did not moot [plaintiff's] claim.")

2. Application

Here, the ultimate question is whether ABN could recover at trial any relief in addition to the $50 offered by defendants. The answer is no, at this juncture in the litigation, in light of the Court's ruling. The complaint in this case seeks only monetary relief, "for the amount of plaintiff's damages, together with interest and costs." (Compl. At 6). As defendants have offered the maximum amount of damages recoverable by plaintiff--$50—plaintiff's claim is moot and this Court lacks subject matter jurisdiction over the action." Weiss v. Fein, Such, Kahn & Shepard, P.C., No. 01 Civ. 1086 (AGS), 2002 WL 449653, at*3 (S.D.N.Y. March 22, 2002); Ambalu, 194 F.R.D. at 452-53. See also Fox, 42 F. 3d at 139-40.

To be sure, negligence has not been determined . Indeed, in tendering $50, neither defendant concedes liability. Thus, whether defendants were negligent in the transport of the envelope-printing press is still an unresolved question. Given, however, this Court's prior opinion limiting defendants' liability to $50 each and defendants' tender of $50, defendants' negligence, or lack thereof, is academic. The remaining question is whether the Court's opinion limiting defendants' liability based on the package limitation is correct. This is not an issue for this Court, as it has ruled. The issue must be resolved by the Second Circuit, and the issue of negligence will present an actual case or controversy only if the Second Circuit reverses.

Still, plaintiff would have the Court conduct a trial now to determine liability. While there is arguably some logic to proceeding in this fashion, in the end it is not a viable option. See Abrams, 719 F. 2d at 32 (concluding that "there is no justification for taking the time of the Court and the defendant[s]" in a trial to determine defendants' liability where defendant has "more than satisfied " plaintiff's damages claim.)

Plaintiff's principal argument for proceeding with a trial now is that it is error for the Court to enter judgment against defendants based on their tenders because defendants do not concede liability. (Pl's Opp. Mem. At 6 ("We have been unable, despite considerable research efforts, to uncover any case involving a monetary offer of judgment where the offeror has not conceded liability.")). This argument is not supported by case law. The Second Circuit has affirmed a district court's dismissal of a complaint for mootness following a Rule 68 offer of judgment even though the offer was " not to be construed either as an admission that the defendant is liable....or that the plaintiffs have suffered any damages." Abrams, 719 F.2d at 25-26. Another court in this district granted a motion to dismiss for lack of a case or controversy following an offer by defendants to pay all plaintiff's damages. Cresswell v. Prudential-Bache Sec. ,Inc., 675 F. Supp. 106, 107-08 (S.D.N.Y. 1987). That offer did not include an admission of liability, but the court granted the motion "despite [plaintiff's] eloquent protestations concerning the wrong allegedly practiced by [defendant] on unknowing investors." Id at 108. Thus, a tender of judgment that does not include an admission of liability still may render a case moot so long as defendants have offered all relief available to plaintiff.

More significantly, the case is now moot because this Court cannot grant plaintiff "any effectual relief" beyond the $50 already offered by defendants. Even if it

prevailed at trial, plaintiff would be entitled to a maximum of $50 from each defendant, no more, and each defendant has already offered to pay $50. See Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (holding case moot when "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law"). As defendants stand to lose only $50 they have little interest in vigorously defending this case at trial., and it would be unfair to require deendants to spend thousands of dollars defending a case where they have only $50 at risk. Even plaintiff lacks the necessary "legally cognizable interes in the outcome" because it is in the same position as defendants. See Fox , 42 F. 3d at 140. It would be litigating a case at a significant expense where the most it could recover has already been offered. See Ambalu, 194 F.R.D. at 452. A trial at this stage would be apoor use of the Court's resources and the parties' time and money. The case is moot and the Court lacks subject matter jurisdiction. Abrams, 719 F.2d at 32-33.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are granted and the complaint is dismissed. Judgment will be entered against defendants in the amount of $50 each, without interest, fees, or costs, and against plaintiff dismissing its claims for damages in excess of $50. The Clerk of the Court shall close this case.

SO ORDERED.

Dated: New York, New York
April 1, 2005

Denny Chin
United States District Judge

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App.C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ABN AMRO Verzekeringen BV and
Hartford Fire Insurance Company,
Plaintiffs,

OPINION
01 Civ. 5661
-against- 02 Civ. 1238,

(Consolidated)

Geologistics Americas Inc. and
Alfred James, d/b/a Art Messenger
And Delivery Service,
Defendants.

Alfred James d/b/a Art Messenger
And Delivery Service,

Third Party Plaintiff,

-against-

DHL Airways, Inc.,

Third Party Defendant.

APPEARANCES: (see last page)

CHIN, D.J.

Plaintiffs bring this diversity action to recover for damage during transport to a large, prototype

Envelope- printing press. The 7,000 pound machine was damaged on its return home to Glen Head, New York from a trade show in Europe. Plaintiffs, subrogated insurers ABN AMRO Verzekeringen BV ("ABN") and Hartford Fire Insurance Company ("Hartford"), have sued the freight forwarder and customs broker, Geologistics Americas, Inc.
("Geologistics"), as well as the trucker they contend is responsible for the damage on the ground in New York, Alfred James d/b/a Art Messenger and Delivery Service ("Art Messenger"). Art Messenger has impleaded DHL Airways ("DHL"), who shipped the machine by air from Amsterdam to JFK Airport in New York.

The parties cross-move for summary judgment.. 1. For the reasons stated below, plaintiffs' motions are denied in all respects, the motion of defendant Geologistics for summary judgment on liability is denied, and the motions of geologistics and Art Messenger for partial summary judgment are granted, limiting any liability to $ 50.

Background

I. The Facts

The following facts are not disputed unless otherwise noted.

A. The Parties

ABN sues as subrogee of its insured, Halm Industries International, Co. of the Netherlands ("Halm Holland"); Hartford does so as subrogee of Halm Industries, Co. ("Halm U.S."). 2. Plaintiffs assert the loss

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1. DHL has not appeared in this action; nor, according to the Court's docket, has it been served with the third-party complaint..

2. I refer to the entities as "Halm" when it is not necessary to distinquish them.

to Halm U.S. exceeds $ 668,623. (See pl. R. 56.1 Statement
Ex. B (Halm cost analysis); Puma dep. at 68). The two insurers paid out a total of $ 648,341; ABN paid Halm Holland $ 478,341 and Hartford paid Halm U.S. $ 170,000.
(Puma dep. p.38).

The corporate headquarters of Halm U.S. are located in Glen Head, New York; the company does business in the Netherlands as Halm Holland. Geologistics, a company with offices worldwide, provides a variety of transportation management services, including freight-forwarding and customs brokerage. (See Kelly Aff. ¶ 5). Art Messenger is a small trucking operation owned by Alfred James; it had between four and five trucks in June 2000. (James dep. at 9).

B. The Shipment

In June 2000, after displaying a prototype of Halm's printing press—the EM5315 Envelope Master—at an industry trade show in Germany, Halm hired Geologistics to arrange to transport the machine back to corporate headquarters in New York. (Puma Dep. at 13, 20-22, 34-35, 38; Schifano Dep. 49, 94). Halm had used Geologistics for a number of shipments—at least twenty-five—in the past;Halm had given Geologistics a customs power of attorney form in January 1997. (Schifano Dep. at 6-7; Schifano Aff. ¶ 8). Halm provided Geologistics with a pro forma invoice for the machine for customs clearance, showing a value of $ 600,000.

1. The Geologistics Waybill and Sales Invoice

On June 13, 2000, Geologistics issued House Air Waybill No. AMS 0269225 from its Amsterdam office for a shipment of the machine and its parts. The shipmen tcontained four crates, weighing about 7,000 pounds in total; the largest crate contained the press itself, and measured 8' x 6' x 7'.

The waybill listed Geologistics (Holland) as the forwarder, Halm Holland as the principal, and Halm U.S. as the consignee, and reflected shipment from the Amsterdam Airport through Brussels to JFK. Boxes labeled "Declared Value for Carriage" and "Declared Value for Customs" were marked NVD and NCV, or no value declared and no customs value, respectively.

After the shipment, on June 27, 2000, Geologistics also issued Halm a sales invoice, No. 0029201067, for $ 2,276.68. The invoice reflected details of the shipment, which departed Amsterdam for New York on June 14, 2000. The invoice lists Halm Holland as the shipper, Halm U.S. the consignee, and DHL Airways as the carrier. As for insured vale, the invoice lists "Not Insured" with Geologistics.

The reverse of the invoice contained standard "Terms & Conditions of Service" (thc "Terms & Conditions") approved by the National Customs Brokers and Forwarders Association of America (Rev. 9/87). (Schifano Aff. ¶¶ 6,8). In pertinent part, the Terms & Conditions provide:

" (1) SERVICES BY THIRD PARTIES: Unless the Company (Geologistics) carries, stores or otherwise physically handles the shipment, and loss, damage, expense or delay occurs during such activity, the Company assumes no liability as a carrier and is not to be held responsible for any loss, damage, expense or delay to the goods to be forwarded or imported except as provided in paragraph 10 and subject to the limitations of paragraph 8 below, but undertakes only to use reasonable care in the selection of carriers... and others to whom it may entrust the goods for transportation. .. When the Company carries, stores or otherwise physically handles the shipment, it does so subject to the limitation of liability set forth in paragraph 8 below unless a separate bill of lading, air waybill or other contract of carriage is issued by the Company, in which event the terms thereof shall govern.

(2) LIABILITY LIMITATIONS OF THIRD PARTIES:
The Company is authorized to select and engage carriers ...to transport the goods, all of whom shall be considered as the agents of the Customer, and the goods may be entrusted to such agencies subject to all conditions as to limitation of liability for loss, damage, expense and delay and to all rules, regulations, requirements and conditions, whether printed, written or stamped , appearing in bills of lading, receipts or tariffs issued by such carriers. . . . The Company shall under no circumstances be liable for any loss, damage, expense or delay to the goods for any reason whatsoever when said

goods are in custody, possession or control of third parties selected by the Company to forward enter and clear, transport or render other services with respect to such goods.

(6) DECLARING HIGHER VALUATION: Inasmuch as truckers, carriers, warehousemen and others to whom the goods are entrusted usually limit their liability for loss or damage unless a higher value is declared and a charge based on such higher value is agreed to by said truckers etc., the Company must receive specific written instructions from the Customer to pay such higher charge based on valuation and the trucker , etc., must accept such higher declared value , otherwise the valuation placed by the Customer on the goods shall be considered solely for export or customs purposes and the goods will be delivered to the truckers, etc., subject to the limitations of liability set forth herein in paragraphs 8-10 below with respect to any claim against the Company and subject to the provisions of paragraph 2 above.

(8) LIMITATION OF LIABILITY: . . . [T] he Customer
Agrees that the Company shall in no event be liable for any loss, damage, expense or delay to the goods resulting from the negligence or other fault of the Company for any amount in excess of $ 50 per shipment (or the invoice value, if less) and any partial loss or damage for which the Company may be liable shall be adjusted pro rata on the basis of such valuation. The Customer has the option of paying a special compensation to increase the liability of the company in excess of $ 50 per shipment in case of any loss, damage,

expense or delay from causes which would make the Company liable , but such option can be exercised only by specific written agreement made with the Company prior to shipment which agreement shall indicate the limit of the Company's liability and the special compensation for the added liability by to be assumed.

(10) LIABILITY OF COMPANY: . . . [I] t is agreed that any claim or demand for loss, damage, expense or delay shall be only against the carriers, truckmen, lightermen, forwarders, customs brokers, agents, warehousemen or others in whose actual custody or control the goods may be at the time of such loss, damage , expense or delay, and that the Company shall not be liable or responsible for any claim or demand from any cause whatsoever, unless in each case the goods were in actual custody or control of the Company and the damages alleged to have been suffered be proven to be caused by the negligence or other fault of the Company , its officers or employees, in which event the limitation of liability set forth in paragraph 8 herein shall apply. . . . .

(19) CONSTRUCTION OF TERMS AND VENUE: The foregoing terms and conditions shall be construed according to the laws of the State of New York. Unless otherwise consented to in writing by the Company, no legal proceeding against the Company may be instituted by the Customer, its assigns, or subrogee except in the City of New York.

The same Terms & Conditions appeared in the prior Geologistics invoices to

Halm, dating from 1997. (Schifano Aff ¶ 8). Halm did not request additional coverage or pay special compensation to increase the level of liability, nor did it instruct Geologistics to do so. 9 Puma Dep. at 50).

1. The Shipment arrives in New York

The machine arrived at JFK on June 16, 2000. Halm U.S. contacted the Geologistics office at JFK to arrange shipment from the airport to Halm's facility in Glen Head, New York. Halm instructed Geologistics to "make sure the trucking company is prepared to not only unload [the] machine on our dock but they must also be capable of moving it and placing it in our building. We will require a trucking line that is capable of 'rigging' the unit in our building." (letter from Ed Haas to Geologistics dated 6/16/00.

On June 20, Geologistics hired Art messenger to pick up the machine from DHL's facility at JFK and deliver it the next morning to Halm's designated receiver , Shadow Transportation ("Shadow"), located in Huntington Station, New York. (James Aff. ¶¶ 6, 10; James Dep. at 28-33). The arrangement was made with a phone call; Art Messenger had handled "thousands" of shipments for Geologistics since Art Messenger began operation in 1994. (James Dep. at 35, 63; James Aff. ¶ 1; Kelly Aff. ¶ 6; Schifano Dep. at 17-18. Contacts were by telephone; approximately fifty from her Geologistics office.) Art Messenger later sent an invoice to Geologistics; the invoice contained no terms and conditions or limitation of liability. Art messenger contends

That it had the same agreement with Geologistics throughout this period, an agreement evidenced by a letter dated October 3, 1998 from James to Geologistics, informing them of "liability information" for "company files." (Art Messenger R. 56.1 Statement Ex.K; James Aff.
¶ 1-4). In its papers, Art Messenger refers to this document as a "service contract." (See e.g., Art Messenger R. 56.1 Statement ¶ 17; James Aff. ¶ 3. But see James Dep. at 62-63 (referring to the document, not as a contract, but as a letter limiting liability). Below the text of James's letter the following is stamped: "LIMIT OF LIABILITY. THE LIABILITY OF ART MESSENGER & DELIVERY SERVICE SHALL BE LIMITED TO FIFTY DOLLARS (50.00) PER SHIPMENT UNLESS THE CUSTOMER MAKES SPECIFIC WRITTEN ARRANGEMENTS WITH ART MESSENGER & DELIVERY SERVICE TO SPECIFY A HIGHER DECLARED VALUE." (Art Messenger R. 56.1 Statement Ex K; James Dep. at 63). The " customer " refers to whoever arranges shipment , such as geologistics. (James Dep. at 64). Geologistics did not declare a higher value with Art Messenger.

3. The EM5315 Is Damaged

After the trade show in Germany, Halm's printing press was packed under the supervision of Halm personnel and loaded onto a truck for transport to Brussels. (See P1. R. 56.1 Statement Ex. C at 0011). The shipment was signed for on June 14, 2000 as being in

apparent good condition when it was delivered to the airport in Brussels.(Id at 0019). The four pieces arrived at JFK on June 15, 2000 and were cleared through customs on June 17, 2000. DHL Airways released the shipment on June 20, 2000 to Art Messenger. Art Messenger's driver, Armando Vigil, signed for the shipment, which was loaded onto his truck by DHL personnel, and did not note any apparent damage. (Id. at 0020). Vigil, however, could not see the first crate, the largest, because of the way it was loaded on his truck. (Vigil Dep. at 44-45). Vigil did not use "load locks" to tie any of the crates down. (Vigil Dep. at 45).

Art Messenger delivered the machine to Shadow on the morning of June 21. (James Aff. ¶ 25; James Dep. at 29, 36). After unloading the first three smaller crates, according to Vigil, Shadow personnel wrapped the largest crate with chains and pulled it with a forklift to the tail end of the trailer, where they used a forklift to bring it down. (Vigil Dep. at 52-53). As the machine was being brought down, Shadow personnel noticed the crate was damaged. (Id. at 53). Shadow showed Vigil and began taking pictures, telling Vigil he had damaged the machine; Vigil denied this. (Id.) Vigil, who no longer works for Art Messenger, believed that the damage was caused by a forklift. (Vigil Dep. at 58).

Shadow vice president Luca Williams—who had transported the EM5315 several times—recalls the delivery differently. He says that his employees notified him immediately that the shipment was damaged, and he went to view it while it was still in the Art Messenger truck. (Williams Dep. at 10).

Williams said that he got onto the truck, where he saw that the crate was no longer "sound in structure", was " no longer a perfect square" and had obviously been "roughly handled at some point." (Id.at 11). In addition, the "tip and tell"--- a device filled with ink and attached to the side of the crate to record a substantial tilt or fall ---was blue. (Id. at 13). Williams also said that Shadow did not move the crate until Halm was notified, and that Vigil waited at Shadow for about an hour until Halm personnel arrived at Shadow.. (Id. at 14). Williams opined that the top-heavy machine was not damaged in transport; otherwise it would have been laying on its side against the trailer wall and it would be impossible to right it. (Id. at 15-17). Williams testified that there was no forklift damage to the box, and that someone had crudely attempted to repair the damaged crate. (Id. at 26-27). When uncrated, Williams stated the heavy side of the machine was "smashed." (Id. at 27). Shadow took the following exceptions to the delivery: " CRATE DAMAGED/MACHINE HANGING OFF SKID, TIP & TELL IS *BLUE*, MACHINE DAMAGED,"P1. R. 56.1 Statement Ex F).

Except for salvage value, the machine was found to be a total loss. (Puma Dep. at 60, 68-69, 71-75). A cost analysis prepared by Halm found the value of the machine, minus salvage, to be $ 668,623. (See Pl. R.56.1 Statement Ex. B; Puma Dep. at 68). The machine was insured as a prototype, and the two

insurers paid $ 648,341 ; ABN paid Halm Holland $ 478,341 and Hartford paid Halm U.S. $ 170,000. (Puma Dep. at 38, 48). Although the damaged machine was a prototype, the EM5315 was in production in June 2000 and sold for $ 350,000. (Id. at 48).

2. Art Messenger's Trucking Authorization

Art Messenger was not properly authorized for intrastate trucking within the State of New York in June 2000. (See letter from N.Y Dep't of Transp. Dated 9/13/02. At the time, Art Messenger was authorized to truck interstate, as it was validly registered with the Interstate Commerce Commission, the U.S. Department of Transportation, and with the single State Registration System, authorizing it to operate in interstate trucking in New York, Connecticut, Massachusetts and Rhode Island. (James Supp. Aff. ¶¶ 3-5). Separate permitting requirements exist as different considerations come into play.

Discussion

I. Applicable Law

A. Summary Judgment

Summary Judgment will be granted when "there is no genuine issue as to any material fact and. . . .the moving party is entitled to a judgment as a matter of law. " Fed. R. Civ.

P. 56©; see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). Accordingly, the Court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. " Anderson v. Liberty Lobby, Inc. , 477 U.S. 242, 249 (1986). Summary Judgment is inappropriate if, resolving all ambiguities and drawing all inferences against the moving party, there exists a dispute about a material fact "such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248; see Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir., 1991). A factual issue is genuine if it can reasonably be resolved in favor of either party. Anderson, 477 U.S. at 250. A fact is material if it can affect the outcome of the action based on the governing law. Id. at 248.

To defeat a motion for summary judgment, the nonmoving party must do more than raise "some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586; Gonzalez v. Rite Aid of N.Y., Inc., 199 F. Supp. 2d 122, 129 (S.D.N.Y. 2002). There is no issue for trial unless there exists sufficient evidence in the record favoring the party opposing summary judgment to support a jury verdict in that party's favor. Anderson, 477 U.S. at 249. As the Court stated in Anderson, " if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

B.. Liability for Damaged Cargo

The parties agree that New York law applies to this dispute. The Geologistics sales invoice , issued from the New York office, specifies that New York law applies (Terms & Conditions ¶ 19) and the machine was damaged during a shipment entirely within the state.

1. Liability of Arranging Freight Forwarder

Generally, a freight forwarder like Geologistics—an arranging forwarder who never actually handles the goods—is little more than a "travel agent" that is "not liable to a shipper for anything that occurs to the goods being shipped." Prima U.S.. Inc. v. Panalpina, Inc., 223 F. 3d 126, 129 (2d Cir.,2000); see Zima Corp. v. M/V Roman Pazinski, 493 F. Supp. 268, 273 (S.D.N.Y., 1980). There is a "well settled legal distinction between forwarders and carriers"; the former merely arrange for transport , the latter do the "heavy lifting." Prima, 223 F. 3d at 129. Absent proof that its selection of carriers was negligent, the freight forwarder is not liable. Id. Here, Geologistics promised to use "reasonable care in the selection of carriers" in ¶ 1 of the Terms and Conditions. See United Kingdom v. Northstar Servs., Inc., 1 F. Supp. 2d 521, 526 (D. Md. 1998((noting there are no duties outside of contractual ones in this context (under Maryland law) and examining same Terms & Conditions).

2. Carrier Liability

Under New York common law, a common carrier is an insurer against property received by it for transportation; the only exceptions are losses arising from an act of God or from acts of the public enemy. See, e.g.,, Calvin Klein Ltd. v. Trylon Trucking Corp., 892 F. 2d 191, 195 (2d Cir., 1989) ; Sega of Am. Inc. v. A.M. Exp. Freight, Inc, Nos. 92 Civ. 5838 (JSM), 92 Civ. 8232 (JSM), 1995 WL 577784, at * 5 (S.D.N.Y. Sept. 29, 1995). N.Y. U.C.C. § 7- 309 (McKinney 2002)., which applies to intrastate shipments when a bill of lading issues, provides that a common carrier must exercise reasonable care with a shipment in its custody.

C. Limitations on Liability

New York law does not restrict the ability of non-carrier freight forwarders to limit their liability through contract. In the commercial context generally, the Court of Appeals has held that " [i] t is the public policy of this State, however, that a party may not insulate itself from damages caused by grossly negligent conduct , " a principle that "applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum. Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must ' smack [ ] of intentional wrongdoing' " and " evince a reckless indifference to the rights of others." Sommer v. Fed. Signal Corp., 583 N.Y.S. 2d 957, 963 (N.Y. 1992)

(quoting Kalisch-Jarcho, Inc. v. City of New York, 461 N.Y.S. 2d 746, 750 (N.Y. 1983) (citations omitted)

Carriers also may not completely exempt themselves from liability. Art Masters Assocs., Ltd. v. United. Parcel Serv., 566 N.Y.S. 2d 1184, 186 (N.Y. 1990). They may, however, limit liability based on their own negligence to declared value, if the shipper is given a choice of rates depending on the valuation of the goods. Id. N.Y. Transp. Law § 181 (McKinney 1994). These agreements are enforceable "as supported by sound principles of fair dealing and freedom of contracting." Art Masters , 566 N.Y.S. 2d at 186. The Second Circuit, predicting New York law in light of divided lower state courts, held that a limitation of liability agreement between a shipper and carrier is enforceable even when the shipment is lost as a result of a carrier's gross negligence. Calvin Klein , 892 F. 2d at 195.

This standard may vary from that announced in Sommer, 583 N.Y.S. 2d at 963, to the extent that gross negligence differs from recklessness in any meaningful way. More importantly, Sommer involved a fire alarm company, not a common carrier of goods. And since carriers are strictly liable for loss of shipments in their custody, the degree of their negligence is immaterial. Calvin Klein, 892 F. 2d at 195. Common carriers have been able to limit their liability to declared value under the "released value doctrine" since the earliest cases at common law governing railroads." Nippon Fire & Marine Ins Co. v. Skyway Freight Sys., Inc., 235 F. 3d 53, 60 (2d Cir., 2000). As the Second Circuit explained, the reason for a different rule—one that allows carriers greater

freedom of contract to reduce their liability –is that " [u] nlike the parachute school student, or the merchant acquiring a burglar alarm, the shipper can calculate the specific amount of its potential damages in advance, declare the value of the shipment based on that calculation, and pay a commensurately higher rate to carry the goods, in effect buying additional insurance from the common carrier.." Calvin Klein, 892 F.2d at 195 (citations omitted). This is especially so where the contracting parties are "business entities with an on-going commercial relationship," id, and insurance is widely available.

Thus, so long as (1) the language of the limitation is clear, (2) the shipper is aware of the terms of the limitation and (3) the shipper can change the terms by indicating the true value of the goods being shipped, under New York law a common carrier may limit its liability for negligence, even gross negligence, to an amount agreed to by the parties. Id. at 193-194; N.Y. U.C.C. § 7-309(2).

To avoid such a liability limitation --in the either the carrier or non-carrier context—New York law requires either affirmative wrongdoing or a reckless indifference to the rights of others—"whether or not termed 'gross negligence'" Sommer, 583 N.Y.S. 2d at 963 n.3.

II. Application

Applying these standards to the facts of this case, I first discuss whether a question of fact exists regarding the liability of Geologistics and Art Messenger. I conclude that there are questions of fact, but only as to ordinary negligence. Next, I discuss the enforceability

and operation of the liability limitation of the parties' contracts. I conclude that, because there is no question of fact regarding affirmative wrongdoing or reckless indifference, they are both enforceable to limit any recovery by the plaintiffs.

1. Questions of Fact Remain As To Art essenger's Liability For Negligence.

There are material questions of fact that remain as how the EM5315 was damaged, and by whom. Put simply, it is not the Court's task at this stage to decide whether to believe Art Messenger's former employee, Vigil, or the vice-president of Shadow, Williams, and thus it is not possible to know exactly what happened to the machine. Summary judgment on liability for negligence must therefore be denied.

There is no question, however, that whatever happened was, at worst, the result of ordinary negligence. Plaintiffs have not come forward with any credible evidence from which a reasonable jury could find that the machine was damaged by recklessness or affirmative wrongdoing. This is not a case of intentional conversion. Even William's opinion that someone tampered with the crate in an attempt to conceal the damage does not rise to that level Likewise, defendant s' allegation that transporting the printing press in a general merchandise truck, not equipped for heavy machinery and not tied down, fails far short of what a reasonable jury would require for such a finding.

Williams himself testifies that one proper way to transport the machine was "up against the wall" of the truck, and that "for what he's working with, that's possibly the best he could have done." (Williams'Dep. at 29). Williams also testified that he believed the machine did not—and could not—tip over inside the truck, and that any damage occurred outside the truck, in loading or unloading. (Id. at 34). Nor was Williams "surprised" that a general merchandise truck was used, because "people take chances all the time." (Id. at 20-21).

Even when viewed in the light most favorable to the plaintiffs, Art Messenger's alleged failures remain the stuff of negligence. It is well settled that " conclusory allegations" and "mere speculation" and "conjecture" will not suffice to transform possible negligence into possible recklessness or more. Chukwuma v. Groupe Air France, Inc., 767 F. Supp. 43, 48 (S.D. N.Y. 1991) (discussing allegations intende to circumvent limitation of liability under Warsaw convention) (citations omitted). Here, to the extent issues of fact exist, they are matters of carelessness at worst, not reckless indifference or intentional wrongdoing.

3. Questions of Fact Remain as to Selection of Art Messenger

Similarly, there remains a question of fact about whether Geologistics negligently selected Art Messenger. For example, although at one time in this litigation Art Messenger insisted that a

denial from the New York State Department of Transportation concerned a permit to carry ammunition or other hazardous goods (see James Aff. ¶¶ 7-8) , in fact the denial concerned its application to truck intrastate. (See Letter from N.Y. Department of Transportation dated 3/23/02). Failure to choose a properly regulated carrier may not be negligence per se; it also remains to be seen whether , in fact, Art Messenger was merely out of technical compliance , or something more. The fact that Geologistics used Art for "thousands" of shipments, presumably without incident, while persuasive, is not dispositive. Cf. Prima, 223 F.3d at 130 (noting that the stevedore chosen by the freight forwarder was the "designated official Port of Genoa stevedore"). In any event, there has been no evidence offered about industry custom in this regard. Cf.. Northstar, 1 F. Supp. 2d at 526 (noting lack of testimony regarding purported duty to verify insurance coverage of carrier).

Moreover, Geologistics knew this shipment concerned a valuable, heavy machine, and it received specific instructions to use a trucker who could "rig" the machine into its facility, something Art Messenger—a small trucking line—could not do. Summary judgment regarding liability for negligently selecting Art Messenger must therefore be denied. As with Art Messenger, however, there is no question of fact concerning any more culpable conduct—recklessness or intentional wrongdoing—by Geologistics, as none of these allegations amount to anything more than ordinary negligence.

3. Any Liability Is Limited To Fifty Dollars

Nonetheless, any liability of Geologistics or Art Messenger is limited to $ 50.

a. Geologistics

To begin, it is evident that the terms and conditions printed on the reverse side of the Geologistics invoice to Halm are standard in the industry See M.E. Int'l. Inc v. Schenkers Int'l. Forwarders, Inc. No. 88 Civ.1429 (SWK), 1990 WL 83524, at *1 (S.D.N.Y. June 8, 1990). (noting this but declining to import the terms to an inexperienced plaintiff without prior actual knowledge). Similar (if not identical) limitations of liability have been enforced in a number of cases. See e.g., Prima, 223 F. 3d at 129; Calvin Klein, 892 F.2d at 194; Ins. Co. of N.Am. v.NNR Aircargo Serv. Inc., 201 F. 3d 1111, 1114 (9th Cir., 2000); Capitol Converting Equip., Inc. v. LEP Transp. Inc, 965 F. 2d 391, 395 (7th Cir., 1992); Gen. Elec Co. v. Harper Robinson & Co 818 F. Supp. 31, 35 (E.D. N.Y. 1993); Northstar, 1 F. Supp. 2d at 524; Pac. Tall Ships Co. v. Kuehne & Nagle, Inc., 94 F. Supp. 2d 928, 930-931, 934 (N.D. Ill. 2000); Hoogwegt U.S. Inc. v. Schenker Int'l. Inc., 121 F. Supp. 2d 1228, 1231 (N.D. Ill. 2000); Indep. Mach. Inc. v. Kuehne & Nagle, Inc. , 867 F. Supp. 752, 765 (N.D. Ill. 1994).

These cases generally require a course of dealing analysis. This is because , as here, the invoice terms generally arrive after shipment (and damage). A course of dealing is used to add the terms to the – often oral—contract governing the damaged shipment at issue. See Northstar, 1 F. Supp. At 524-26. Here, plaintiffs concede that Halm was bound by the invoice terms and address their arguments to the text

of the agreement and its allegedly unenforceable effects. 3

Plaintiffs argue primarily that the limitation is unenforceable because it violates public poicy by exonerating recklessness and illegality. This argument—which culminates in a discussion of the illegality of contract doctrine—is wholly without merit. Mainly, plaintiffs argue that, in theory, the Terms & Conditions offer such a broad limitation of liability—"from any cause whatsoever"—that the clause would apply equally to negligence, recklessness and intentional wrongdoing., and such a broad disclaimer of liability is void under New York law. As should be obvious, the argument is not relevant absent some evidence of such conduct, something plaintiffs here sorely lack. A court ought not refuse to enforce a contract because of such "what ifs"

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3. Plaintiffs obliquely touch on the issue of whether the Terms & Conditions are part of the contract, complaining that the invoice was not received until seven days after the shipment,and stating the invoice is the only document that "purports to govern the responsibilities " of defendants . (Pl. Mem. At 10). In any event, plaintiffs raise no question of fact, and it is clear a course of dealing exists between Halm and Geologistics, and between Geologistics and Art Messenger. (See Schifano Dep. at 17, 24; Schifano Aff. ¶ 8).

Stripped of their fiery rhetoric, plaintiffs present no colorable argument for a jury to find any more culpable conduct than negligence. The notion that Art Messenger's failure to properly maintain a permit for intrastate trucking renders the Geologistics unenforceable for "illegality" is rejected out of hand. The remedy for Art Messenger's failure to maintain its intrastate permitting resides with state regulatory authorities, who may penalize Art Messenger by assessing fines. "[A] court should not affix the additional sanction of rendering a private contract void . . . " Land Ocean Logistics, Inc. v. Aqua Gulf Corp, 68 F. Supp. 2d 263, 270 (W.D. N.Y. 1993); see Concord Indus. Inc. v. K.T.I. Holdings, Inc. 711 F. Supp. 728, 729 (E.D.N.Y. 1989). In any event, Art Messenger was hardly an unregistered carrier; it was properly permitted to perform interstate trucking and operate in four states. Nor is there any evidence in the record to suggest Art Messenger poorly maintained its trucks or hired reckless, unqualified drivers, much less any evidence that Geologistics failed to use reasonable care –or was reckless—in not noticing any such defects.

In any event, as discussed above, there are sound differences between exculpation clauses in other contexts and limitations of liability in shipping. "[T]he very purpose of a limitation of liability clause is to permit a carrier to anticipate the amount of risk it takes on, charge appropriately for bearing that risk, and avoid unforeseeable risk." Nippon Fire & Marine Ins.Co. v. Skyway Freight Sys., Inc, 45 F. Supp. 2d 288, 294 (S.D.N.Y. 1999), aff'd. 235 F. 3d 53 (2d Cir., 2000)..

To allow Halm not to declare the proper value of its shipment, avoid paying a higher rate, but

then recover the true value of the goods would allow Halm to have it both ways. Accordingly, the limitation of liability shall be enforced. It is undisputed that ahlm did not endeavor to declare a higher value pursuant to ¶ 6 of the Terms & Conditions. Thus, the liability of Geologistics , if any, is limited to $ 50.

b. Art Messenger

As discussed above, just as Art Messenger's failure to maintain proper permitting does not vitiate Halm's contract with Geologistics, it does not vitiate Art messenger's contract with Geologistics.

While the evidence in the rcord is somewhat less clear in this less formal relationship, Geologistics and Art Messenger nonetheless agree that, just like the hundreds of other shipments Art Messenger handled for Geologistics, the shipment at issue was subject to a $ 50 limitation of liability y. Essentially, Art Messenger and Geologistics had an underlying agreement to imply the liability limitation term into each successive contract they undertook. The agreement is evidenced by James's testimony and a letter dated October 3, 1998 from James to Geologistics , informing them of "liability information" for "company files."(Art Messenger R. 56.1 Statement Ex. K; James Aff. ¶¶ 1-4). On its face, the letter was intended as an ongoing modification , and informed Geologistics of its right to make "specific written arrangements . . . to specify a higher declared value." (Art Messenger R 56.1 Statement Ex. K; James Dep. at 63.)

Unlike Geologistics, however, Art Messenger's invoices do not contain the Terms &

Conditions, nor were bills of lading issued Nonetheless, James's testimony and the letter to Geologistics is sufficient to establish, over the course of hundreds of transactions, a course of dealing. Indeed, plaintiffs concede that there was an "extensive prior course of dealings" between Geologistics and Art Messenger. (Pl. Mem. At 22). In any event, plaintiffs do not raise a question of fact on the issue merely by offering speculation, or pointing out what was missing from the relationship, such as bills of lading or published tariffs. Thus, in the absence of any significant challenge on the issue, Geologistics is bound to Art Messenger's limitation of liability.

But what of Art Messenger's liability to Halm? Applying federal common law in Nippon, the Second Circuit found that a secondary carrier owed no duty at all to the shipper, even without a "Himalaya clause" extending a primary carrier's limitation to to any secondary carriers. 235 F.3d at 60, 62 n. 4. This result depended on a valid limitation between the primary and secondary carriers. The court's rationale was that the secondary carrier is entitled—if not obligated—to treat the primary carrier as either the owner of the goods or one with the authority of the owner, thus rendering the true owner an "unforeseeable plaintiff." Id. at 62 n.4. The district court also persuasively reasoned, in light of the underlying purposes of the limitation—to apportion risk among contracting parties—that the secondary carrier "may not be subject to the very liability it contracted to avoid just because plaintiff and not [the primary carrier] was the ultimate owner of the goods." Nippon, 45 F.Supp. 2d at 294. The Warsaw convention provides a similar result. There,

independent contractors/agents of a carrier are protected by the carrier's limitation of liability if their actions are in furtherance of carriage. See Alleyn v. Port Auth. of N.Y, 58 F. Supp. 2d 15,23 (E.D.N.Y. 1999)..

The result is the same under New York law, viewed as a question of agency. See Nippon , 235 F. 3d at 61 (" It is well established that a shipper may sue a secondary carrier of its goods for any loss or damage that may be caused by those carriers. However, such actions have always had their basis in contract—the theory being that the shipper is either a disclosed or undisclosed principal of its agent, the primary carrier.") Here, the Terms & Conditions define the agency relationship between Halm and Geologistics. These terms informed Halm that Geologistics would contract with carriers and "third parties" who "usually" limit their liability, and that these limitations would be passed on to Halm (the principal) unless Halm specifically instructed Geologistics to declare a higher value; and they informed Halm that these third parties would be considered Halm's agents. (Terms & Conditions ¶¶ 2, . 6). See Yves St, Laurent v. Air Freight Transp. Corp. of N.J, 445N.Y.S. 2d 745, 747 (1st Dep't.1982).

As the court in Yves St. Laurent explained, Geologistics, "on behalf of the plaintiff, could clearly have paid the extra monies and declared a greater valuation had it been instructed to." Id. The court noted that "the plaintiff had been originally informed by [the freight forwarder] that shippers limit their liability to $ 50.00." Id. The court concluded that a freight forwarder , as agent of the plaintiff, "had the authority to enter into a usual and customary shipping

contract which limits the carrier's liability." Id. (internal quotations omitted). "It is established common law doctrine that a sub-bailee may take advantage of a liability limitation contractually agreed upon between the original bailee and bailor." Lerakol Inc. v. Pan Am World Airways, Inc. 783 F. 2d 33, 36 (2d Cir., 1986) (citing Berger v. 34th St. Garage, 171 N.Y.S. 2d 824, 826 (N.Y. 1958).

Courts in New York regularly apply these concepts . In Rifkin v. Pologeorgis Furs, Inc, 612 N.Y. S. 2d 1 (1st Dep't. 1994), the First Department enforced the limitation of liability as between the shipper (Furs) and the carrier (UPS), but denied summary judgment as to the owners of the coat. The court stated that such a determination "will depend on several factors. . . including the nature of the relationship between plaintiffs and defendant Furs to procure UPS to ship the fur coat." Id. at 2. Here, the primary purpose of the contract was to authorize Geologistics to arrange for shipment by selecting carriers on Halm's behalf.

The Court of Appeals used the same principles in the case of a buyer at a Christie's auction whose $ 886,000 lamp was damaged when shipped from New York to Japan. Kitz Corp. v. Transcon Shipping Specialists, Inc , 652 N.Y.S. 2d 720, 721 (N.Y. 1996). Christie's hired a packaging company to crate the lamp and employed a freight forwarder . to arrange shipment. The buyer sued the company that packaged the lamp, and the packaging company sought contribution from the trucker. The Court of Appeals held that the limitation of liability in the trucking company's contract with the freight forwarding company hired to arrange for shipment was not

Enforceable against the packaging company, which had no contractual relationship with the trucking company and was not aware of the limitation. The packaging company "had no contract with [the trucker] , had no ongoing relationship with [the trucker], and played no part in its selection." Id. In other words, no party had authority as an agent to bind the packaging company to the liability limits of the carrier.

The First Department decision below was more explicit on this point, noting that " [a] party that is a stranger to a contract of carriage is not bound by limitations of liability in that contract." Kitz Corp. v. Transcom Shipping Specialists, Inc., 634 N.Y.S. 2d 75, 76 (ist Dept. 1995) (citations omitted) . This was so because "[no] party had authority as an agent or otherwise to bind defendant to a limitation of [the trucker's] liability," nor was there any evidence of any prior dealing." Id.

Applying these principles here, there is no question but that Halm was no "stranger" to the contract between Geologistics and Art messenger. Geologistics, pursuant to its agreement with halm, engaged Art Messenger, and thereby bound Halm to the terms of its contract with Art Messenger. That contract contains a limitation of liability term. As Geologistics did not, on behalf of Halm, declare ahigher value or pay a higher rate, the limitation shall be enforced , with the result that any liability of Art messenger to Halm is limited to $ 50.

CONCLUSION

For the reasons set forth herein, plaintiffs' motions are denied in all respects, the motion of

defendant Geologistics for summary judgment on liability is denied, and the motions of defendants Geologistics and Art Messenger for partial summary judgment limiting their liability, if any, to $ 50 are granted. The parties shall appear for a pre-trial conference on April 18, 2003 at 11:00 a.m. in Courtroom 11A, United States Courthouse, 500 Pearl Street, new York, New York.

SO ORDERED

Dated: New York, New York

March 31, 2003

DENNY CHIN

United States District Judge

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NEW YORK TRANSPORTATION LAW

§ 95. Application of Article

The provisions of this article shall apply to the transportation of passengers or property from one point to another within the state of New York, and to any common carrier performing such service.

§ 98. Tariff Schedules; publication

Every common carrier shall file with the commissioner and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all other points thereon; and between each point upon its route or upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased , operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established , the several carriers in such through route shall file, print and keep open to public inspection , as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers shall be carried, and shall also contain the classification of passengers or property in force , and shall also state separately all terminal charges ,

storage charges , icing charges, and all other charges which the commissioner may require to be stated , all privileges or facilities granted or allowed, and any rules and regulations which in anywise change , affect or determine any part , or the aggregate of , such aforesaid rates, fares and charges ,or the value of the service rendered to the passenger , shipper or consignee. Such schedules shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for convenient inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of an agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in evey such station or office. The form of every such schedule shall be prescribed by the commissioner and shall conform in the case of railroad company as nearly as may be in the form of schedule required by the interstate commerce commission under the act of congress entitled " An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven and the acts amendatory thereof and supplementary thereto. The commissioner shall have power, from time to time, in his discretion, to determine and prescribe by order such changes in the form of such

schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

§ 103. Transportation prohibited until publication of schedules; rates as fixed to be charged; passes prohibited

1. No common carrier subject to the provisions of this chapter shall engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property , or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

****"

§ .111. Liability for damage

In case a common carrier shall do, cause to be done or permit to be done any act, matter or thing required to be done, either by law or by order of the commissioner, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom , and in case of recovery, if the court shall find that such act or omission was willful, it may in its discretion fix a reasonable counsel or attorney's fee, which fee shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CATHERINE O'HAGAN WOLFE
CLERK

FILED
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DC Docket Number: 01-cv-5661
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Denny Chin

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of July two thousand seven.

05-1917-cv
ABN v GEOLOGISTICS

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant ABN AMRO VERZEKERINGEN BV. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Catherine O'Hagan Wolfe, Clerk
Motion Staff Attorney